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No. 11,695

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CAL-BAY CORPORATION, MARIA FARIA,
JOSEPH FARIA, JR., EDWARD FARIA,
and MAE E. ROCHE,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANTS.

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FILED

DEC 23 1947



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Appellee.

BRIEF FOR APPELLANTS.

The appeal is by the defendants Cal-Bay Corporation, Maria Faria, Joseph Faria, Jr., Edward Faria, and Mae E. Roche from a judgment awarding them compensation in an action in condemnation. They appealed because the compensation awarded was inadequate and unjust.

STATEMENT OF JURISDICTION.

The action was by the United States to condemn lands in Contra Costa County, California, pursuant to and under the provisions and authority of and for

the purposes and uses authorized by the Acts of Congress approved March 27, 1942, Public Law 507, 77th Congress, and June 22, 1944, Public Law 347, 77th Congress. R. 2-3. The district court had jurisdiction under the General Condemnation Act, 40 U.S.C.A., sec. 257, and the Second War Powers Act, 50 U.S.C.A., fol. sec. 632. The judgment appealed from was entered February 28, 1947. R. 135. Defendants' motion for a new trial was denied April 8, 1947. R. 139. Notice of appeal was filed April 26, 1947. R. 140. This court has jurisdiction upon appeal to review the judgment under section 128 of the Judicial Code, as amended, 28 U.S.C.A., sec. 255 (a).

STATEMENT OF THE CASE.

The complaint in condemnation was filed July 22, 1944, to condemn 5430 acres of land, more or less, in Contra Costa County, California, for the purpose of expanding an ammunition dump or United States Naval Magazine. R. 2-11. The tract consisted of a number of separately owned parcels, and for convenience they were designated by numbers in the complaint and on the map annexed thereto. R. 8. The same numbers were used to designate the parcels at the trial.

The parcels involved on the appeal are parcels 57, 58, 59, and 64. In general, they are situated about 25 miles northeast of the city of Oakland. Locally, they are situated about 2½ miles southeast of Port Chicago, 5 miles southwest of the city of Pittsburg,

and 3 miles northeast of the town of Concord. An idea of the exterior character of the parcels may be obtained by reference to photographs appearing in the record. R. 1215, 1239, 1240, 1250. The originals of 13 maps admitted in evidence at the trial are before the court on this appeal pursuant to its order. R. 1287-1290.

No question of title was involved at the trial. R. 218. When the action was commenced, appellant Mae E. Roche was the owner of parcel 57; appellant Edward Faria was the owner of parcel 58; appellant Maria (Mary) Faria was the owner of parcel 59; and Geraldine Faria was the owner of parcel 64. R. 8-9.

The area was oil and gas bearing, and running over the years owners of lands therein, as lessors, had entered into oil and gas leases. These had gradually centered in appellants Cal-Bay Corporation and Joseph Faria, Jr. Their chains of title were undisputed at the trial and established without objection. R. 218-232, Dfs. Exs. 2-7. The leases were uniform and are typified by defendants' exhibit 2. R. 1217-1229. Each was for the term of 20 years and so long thereafter as oil or gas in paying quantities was produced. R. 1218. Each was on a royalty basis of 12½% to the lessor. R. 1218-1219. Each required the lessee to commence drilling operations within a year and to diligently prosecute drilling to a depth of 5000 feet. R. 1220. Each required the lessee to drill a new well if a dry hole had resulted from previous drillings. R. 1221. Each required the

eventual drilling of a well on each 20 acres leased. R. 1222. And each lease provided that it was one of a series of leases in a general district and that commencement of drilling within a year under one lease should be deemed drilling under all. R. 1229.

On the filing of the action an order was made granting appellee immediate possession of the lands subject to the action. R. 12-13. In parcel 59, appellant Cal-Bay Corporation was then lessee of 367.36 acres under an oil and gas lease from appellant Maria Faria, of which 208.83 acres were subject to the action and 158.53 acres were not subject to the action. R. 218-219. In parcel 58, it was lessee of 5 acres under an oil and gas lease from appellant Edward Faria, all of which was subject to the action. R. 221. In parcel 57, it was lessee of 4.96 acres under an oil and gas lease from appellant Mae E. Roche, all of which was subject to the action. R. 220. And contiguous to parcel 59 on the northeast, it was lessee of 310 acres under an oil and gas lease from Manuel V. Alveraz, none of which was subject to the action. R. 221-222.

At the same time, in parcel 59, appellant Joseph Faria, Jr., was then lessee of 73.51 acres under an oil and gas lease from appellant Maria Faria, of which 63.91 acres were subject to the action, and 9.60 acres were not subject to the action. R. 218-219. And in parcel 64, he was lessee of 228.55 acres under an oil and gas lease from Geraldine Faria, of which .65 acres was subject to the action, and 227.90 acres were not subject to the action. R. 222-223.

During the pendency of the action, and with the approval of the court, stipulations were entered into between appellee and appellants Maria Faria, Edward Faria, and Mae E. Roche, agreeing upon the compensation to be paid them for their respective interests in parcels 57, 58, and 59, *except mineral rights under oil and gas leases affecting said parcels.*

R. 17-29. In the case of appellant Mae E. Roche, mineral rights were under the oil and gas lease of 4.96 acres in parcel 57 to Cal-Bay Corporation, all of which were taken by appellee. In her answer and at the trial she claimed compensation therefor in the sum of \$3500. R. 47-49. In the case of appellant Edward Faria, mineral rights were under the oil and gas lease of 5 acres in parcel 58 to Cal-Bay Corporation, all of which were taken by appellee. In his answer and at the trial he claimed compensation therefor in the sum of \$3500. R. 58-61. In the case of appellant Maria Faria, mineral rights were under the oil and gas leases of 440.87 acres in parcel 59 to appellants Cal-Bay Corporation and Joseph Faria, Jr., of which the appellee took 272.74 acres. In her answer and at the trial she claimed compensation therefor in the sum of \$75,000, and she also claimed severance damage in the sum of \$35,875 to her mineral rights under said leases as to the remaining 168.13 acres in parcel 59. R. 51-57.

In his answer and at the trial appellant Joseph Faria, Jr. claimed compensation in the sum of \$15,575 for his leasehold interest in the part of parcel 59 taken by appellee, compensation in the sum of \$175

for his leasehold interest in the part of parcel 64 taken by appellee, and severance damage in the sum of \$38,500 to his leasehold interest in the remaining parts of parcels 59 and 64. R. 29-41.

In its answer and at the trial appellant Cal-Bay Corporation claimed compensation in the sum of \$3850 for its leasehold interest in the 4.96 acres taken by the appellee in parcel 57, compensation in the sum of \$3900 for its leasehold interest in the 5 acres taken by the appellee in parcel 58, compensation in the sum of \$461,000 for its leasehold interest in the 208.63 acres taken by the appellee in parcel 59, and severance damages in the sum of \$150,000 to its leasehold interest in the parcels and contiguous lands not taken by the appellee. R. 41-46. The claims of this appellant require more detailed explanation.

Appellant Cal-Bay Corporation was incorporated in California on April 17, 1942. R. 230-231, 310. It was incorporated for the purpose of acquiring the oil and gas leases assembled by appellant Joseph Faria, Jr. in the area involved and developing the lease property. R. 230-231. Under permits from the Division of Corporations of the State of California its shares were sold to the public at \$1 a share and over \$250,000 was invested in the company by its 632 shareholders. R. 232-233, 252, 326, 367-368. *All* the money thus raised and invested went into the development of the property and the drilling of the well known as Faria No. 1 on parcel 59. R. 367-368. No salary or other compensation was received by any officer of the corporation. R. 368.

The exact location of the well is shown on the map admitted in evidence as Defendants' Exhibit 12, the original of which is before the court. R. 237. Photographs showing the derrick of the well and developments and conditions at the well appear in the record at pages 1239, 1240, 1241, and 1242.

The drilling of the well was commenced in July, 1943, discontinued in November, 1943, and resumed in June, 1944. R. 253-254. At a depth of 3000 feet gas showings were found. R. 239. At a depth of 4268 feet the volume of gas amounted to 100,000 cubic feet a day, and this increased to 125,000 cubic feet a day as greater depths were reached. R. 250.

Location of the well was made on the recommendation of Byron Norris, a consulting geologist and petroleum engineer, and developments were supervised by him. R. 621. He had been an inspector in the Division of Oil and Gas of the State of California for 9 years. R. 632. His first inspection of the Cal-Bay properties in March, 1942, was followed by careful examinations and tests. R. 626-632. He found pronounced surface indications of oil and gas. R. 626-632. He found pronounced favorable formations. R. 632-644. He recommended the drilling of the well known as Faria No. 1 at the point where it was drilled and was of the opinion that oil or gas would there be encountered at a depth of 5000 feet. R. 658, 662.

Drilling of the well was actively in progress when the present action was commenced on July 25, 1944, and the appellant Cal-Bay Corporation was served

with notice that the appellee required immediate possession of the lands subject to the action. R. 255. All work was stopped. R. 256. Conferences with representatives of the Navy resulted in the resumption of drilling operations in August, 1944. R. 256, 261. With the approval of the court, a stipulation was entered into on September 28, 1944, between the appellee and the appellant Cal-Bay Corporation, whereby the latter was permitted to remain in possession of parcels 58 and 59 and prosecute its drilling and other operations thereon "until one month after service by the plaintiff on said defendant, or on its attorneys herein, of written notice of the termination of said right to possession." R. 258-260, 279-280. Such notice of termination was served upon the appellant Cal-Bay Corporation on December 15, 1944, and possession was surrendered pursuant thereto on January 15, 1945. R. 280-281.

When drilling had been resumed in August, 1944, with the consent of the Navy representatives, gas showings were encountered at 4760 feet and steadily increased. R. 261-263, 266. On November 28, 1944, so great a volume of gas was encountered at a depth of 4975 feet that it "blew out" the contents of the well and temporarily disabled the well. R. 269-275. In the opinion of Byron Norris, a commercial discovery of natural gas had been made. R. 682-683.

As stated, no question of title was involved at the trial. R. 218. The sole question was the amount of just compensation to be paid these appellants. For

the appellants, testimony on the subject of market value was given by appellant Joseph Faria, Jr., R. 288-301, by John H. Wents, Jr., a consulting petroleum engineer and geologist, R. 799-805, and by William G. Bradford, a dealer in oil and gas leases, R. 860-866; for the appellee, by H. K. Armstrong, a consulting geologist and petroleum engineer, R. 1085-1091, and by Paul Paine, a petroleum engineer, R. 1130-1136. The opinions of the witnesses for the appellee differed widely from the opinions of the witnesses for the appellant. A tabulation of appellants' claims, the opinions on value, and the jury awards is made in the belief that it will serve the ends of clarity and brevity.

TABULATION OF CLAIMS, OPINIONS ON VALUE, AND JURY AWARDS

Cal-Bay Corporation (Leasehold interest)

	Claim	Faria	Wents	Bradford	Armstrong	Paine	Award
(57)	\$3850	\$5000	\$3850	\$5000	\$10	\$60	\$60
(58)	3900	5000	3875	5000	10	30	30
(59)	461000	367000	411500	358000	420	836	836
Sev.	150000	61000	91500	.....	None	None	None

Joseph Faria, Jr. (Leasehold interest)

(59)	\$15575	\$23625	\$15575	\$51200	\$320	\$512	\$512
(64)	175	.....	175	None	5	2.60	5
Sev.	31850	25750	28120	.....	None	None	None

Maria Faria (Mineral rights) (59)

CB ls	\$75000)	.....	\$62500)	\$41600)	\$1050	\$1672	\$1672
JF ls	)	.....	)	)	320	640	640
Sev.	35875	44660	None	None	None

Edward Faria (Mineral rights) (58)

CB ls	\$3500	\$300	\$1000	\$25	\$50	\$50
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Mae E. Roche (Mineral rights) (57)

CB ls	\$3500	\$300	\$1000	\$25	\$60	\$60
Totals	\$784225	\$487375	\$662355	\$462800	\$2175	\$3862.60	\$3865

The basic question on the appeal is whether the compensation awards are inadequate as a matter of law and are not just compensation. That, of course, is but another way of saying that the evidence is insufficient to support the verdict and judgment. Appellants ascribe the inadequacy of the awards to the avowedly partisan attitude of the trial judge. R. 1140. That partisan attitude was reflected in the comments of the court during the course of the trial, in its examination of appellants' witnesses on value, in the jury charge, and in the refusal of the court to give instructions requested by appellants. The inevitable result was that appellants were denied a fair and impartial trial and the right safeguarded by the Fifth Amendment of the Constitution that private property shall not be taken for a public use without just compensation. The appeal, therefore, also presents questions whether appellants were denied a fair trial and due process of law by the acts and conduct of the trial judge, whether the court erred in instructing the jury, and whether the court erred in refusing to instruct the jury in accordance with instructions requested by appellants.

SPECIFICATION OF ERRORS RELIED UPON.

1. The compensation awards are inadequate as a matter of law and are not just compensation.
2. Appellants were denied a fair trial and due process of law by the acts and conduct of the trial judge.

3. The district court erred in instructing the jury as follows:

“Ordinarily, ladies and gentlemen, the court, as I stated to you before, abstains from expressing opinions as to the weight of the evidence. However, due to the somewhat apparent complexities of this case, and in order to be of assistance to the jury in the proper administration of justice, I believe it is my duty to make the following comment to the jury: In the opinion of the court the values fixed by the expert witnesses produced by the defendants in this case appear to the court to be so exaggerated as to make the testimony of those witnesses incredible. The opinion that I have expressed is just the opinion of the court. A Federal judge is permitted to make such a comment to the jury. The jury is not bound by the opinion of the court. The opinion is expressed as a part of the instructions as to the law for such aid as the jury wishes to make of it in determining the factual question. The jurors individually and collectively are entitled to disagree with the opinion of the court. You may have your own opinion and you can come to it. You are not bound in any manner in making a finding in accordance with the view expressed by the court. The reason why the court has expressed the opinion is that it appears to the court that there is no factual basis presented in the testimony of the expert witnesses for the defense upon which the opinion of value given by them can be said to rest.” R. 1188-1189.

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“Mr. Chamberlin: If the Court please, at this time we have certain objections to the instructions given, and also to the failure of the court to give

other instructions. Of course, as the charge is read to the jury or stated to the jury it is pretty hard to put your finger on the particular instructions that your Honor is giving at the time. In this case they did not follow, I do not believe, any of the forms of instructions given by either party, but substantially most of the instructions that both sides proposed. Of course, our main objection, your Honor, is to the instruction which started out with the language, 'Ordinarily, the court abstains from expressing an opinion,' and thereafter your Honor expressed an opinion upon the credibility of certain expert witnesses and also upon the evidence in the case. Our objection to that particular instruction—and it was quite a long one—is that it exceeds the bounds of proper comment by a court in the instructions and amounts to taking sides.—We object to the instructions as prejudicial error, on the ground that it denies the defendants in this action due process of law under the Fifth Amendment to the Constitution, on the ground that it is repugnant to the Fifth Amendment to the Constitution that a defendant is entitled to just compensation in condemnation cases. We object to it on the ground that it is repugnant to the Sixth Amendment to the Constitution in that it denies the defendants in this action a fair trial. * * *” R. 1198-1199.

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“The Court: Very well, all the exceptions of counsel will be noted. You may bring the jury in.” R. 1203.

4. The district court erred in instructing the jury as follows:

“Ordinarily the Court is not permitted to invade the province of the Jury in determining the facts of the case.” R. 1176.

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“Mr. Chamberlin: * * * Your Honor in opening the charge said that ordinarily the court had no power to determine facts. We object to that language of the court upon the ground assigned and would intimate that the court did have such power in this case.” R. 1199.

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“The Court: Very well, all the exceptions of counsel will be noted. You may bring the jury in.” R. 1203.

5. The district court erred in instructing the jury as follows:

“It has been stated to you by counsel during argument that unless compensated by a verdict of the jury the defendants will not be reimbursed for their efforts expended in connection with their gas exploration project. Such reimbursement, however, has no part in the scheme of just evaluation of the defendants’ alleged mineral rights. Many explorations for gas and oil are made all over the world and in innumerable instances are unsuccessful. The Government, because of its exercise of its right of eminent domain to take this property cannot be charged with the drilling or other expenses of the defendants. It is only required to pay the market value as I have defined that term to you of the interest that was taken.

Another statement was made that I think I should comment upon because these matters

might tend to becloud the actual limits of the authority of this jury in determining the amount, if any, of the value of the interest taken here.

Some comment was made to the effect that the fundamental issue was that the defendants should have been given the opportunity to proceed with their tests further, and that the taking therefore resulted in damage to them for that reason. I repeat to you again what I said, that the United States has a paramount right to take the property at any time in the public interest. It may take the property while a building is being erected. It need not give the owner any opportunity to complete the building. Its only obligation is to pay the market value of that which is taken. Likewise the amount that an owner invests in his property is not germane in determining the matter of market value. I may pay \$50,000 for a piece of property, perhaps yielding to the importunities of some glib salesman, and yet the market value of that property may be only \$10,000. If the Government takes that property, the Government is only required to pay the market value of \$10,000, no matter what I may have paid for it or invested in it, because by law just compensation always is only concerned with market value." R. 1191-1192.

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"Mr. Chamberlin: * * * We also object to the instructions which were much farther along in the case, and which your Honor prefaced, I believe, with 'Certain arguments were made before the jury.' Your Honor then proceeded to answer those arguments. We object to the instructions in those regards on the ground they exceed the

bounds of proper comment on the evidence, and that they take sides with the plaintiff in this case, and for that reason is prejudicial error.” R. 1200.

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“The Court: Very well, all the exceptions of counsel will be noted. You may bring the jury in.” R. 1203.

6. The district court erred in instructing the jury as follows:

“The next form of verdict has to do with the defendant Maria Faria, and it reads as follows:

‘We the jury find the fair market value on July 24, 1944 of the royalty interest of the defendant Maria Faria under the leases on Parcel 59 to be the sum of blank dollars. We further find severance damages to the royalty interest of the defendant Maria Faria not taken by the United States to be the sum of blank dollars.’

You will fill in, as you see fit, the blanks in that verdict, as I have heretofore stated.

The next form of verdict reads:

‘We the jury find the market value as of July 24, 1944, of the royalty interest of the defendant Edward Faria under the leases on Parcel 58 to be the sum of blank dollars.’

The next verdict reads:

‘We the jury find the market value as of July 24, 1944 of the royalty interest of the defendant Mae E. Roche under the leases on Parcel 57 to be the sum of blank dollars.’ * * * And you may fill out those blanks in the manner I have indicated.” R. 1195-1196.

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“Mr. Chamberlin: There is one feature here, your Honor, and that is throughout the instructions to the jury you have drawn the distinction between a leasehold interest and the royalty interest. The stipulation which was entered into with the Government—I am objecting in this regard to the forms of verdict which your Honor proposes to submit to the jury—the stipulations which were entered into between the defendants and the Government reserved mineral rights. The value to be determined at this trial is the mineral rights of certain defendants.

The Court: There cannot be any confusion as to what is referred to.

Mr. Chamberlin: Yes, your Honor, for the reason that under those leases they had a reversionary interest. They had a way of getting back the entire mineral rights in addition to the royalties in case the lessor ceased——

The Court: I do not think there can be any confusion on that. That is merely a convenient way to refer to the interest. It has been so referred to——

Mr. Chamberlin: We feel if it were only a matter of royalty, some question might come up as to whether we would be entitled to severance damage. If it is a mineral right we do not feel that way.

Mr. Bourquin: May I object to this in the interest of keeping the record straight? I thought we had agreed on the forms of these verdicts.

Mr. Chamberlin: I submitted some to the clerk——

The Court: The court was probably responsible for that because I was afraid that the jury might be confused when we were talking about

these landlords and still referring to them as mineral interests, and they would not know that was the same kind of interest as the other defendants. I did that for the purpose of distinguishing them, that is all. I do not see any possible prejudice." R. 1202-1203.

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"The Court: Very well, all the exceptions of counsel will be noted. You may bring the jury in." R. 1203.

7. The district court erred in refusing to instruct the jury as follows:

"Defendants' Instruction No. 22

"While it is incumbent upon one who asserts the affirmative of an issue, thus having the burden of proof, to prove his allegations by a preponderance of the evidence, this rule does not require demonstration; that is, such degree of proof, as excluding all possibility of error, produces absolute certainty, because such proof is rarely possible." R. 79.

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"Mr. Chamberlin: * * * We also object to the refusal of the court to give certain instructions. Your Honor placed the burden of proof upon the defendants, and properly so, but your Honor refused to give our instruction No. 22. Instruction No. 22 is to the effect that while it is incumbent upon one who assumes the affirmative of the issue, having the burden of proof to prove his allegations by a preponderance of evidence, this rule does not require demonstration. As we have the burden of proof in this unusual case we think your Honor was prejudicial to the rights of

the defendants in your Honor not giving that instruction." R. 1200-1201.

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"The Court: Very well, all the exceptions of counsel will be noted. You may bring the jury in." R. 1203.

8. The district court erred in refusing to instruct the jury as follows:

"Defendants' Instruction No. 40

"This action concerns the value of the gas and oil rights and the leases given for such development on the lands taken by the Government. Gas and oil leases are recognized by law as being property having a market value even if such leases are in undeveloped territory. Where gas and oil rights are concerned a reasonable probability of successful development is sufficient to make such leaseholds of great value. Where there is a reasonable possibility of production in paying quantities gas and oil leases are common subject of barter and sale and, therefore, have a definite ascertainable market value.

There is a definite market value even where the prospects of successful development are too speculative to be reasonably probable. If the uncertainties are such that the mineral interests in the condemned lands are bought and sold at arms-length transaction for valuable considerations, they have a market price translated into a fair market value for condemnation purposes." R. 94-95.

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“Mr. Chamberlin: * * * We also object to the refusal of the court to give our instructions Nos. 40, 41, and 43, those instructions having to do with market value of the oil and gas leases. We object upon the ground that the refusal to give those instructions is prejudicial error.” R. 1202.

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“The Court: Very well, all the exceptions of counsel will be noted. You may bring the jury in.” R. 1203.

9. The district court erred in refusing to instruct the jury as follows:

“Defendants’ Instruction No. 41

“In this case defendants base their value of the gas and oil rights taken upon the fair market value determined by the opinion of certain witnesses who have information concerning said properties. The opinions of such witnesses as to market value of said gas and oil rights need not be based upon the sales of the same or similar rights. It is sufficient if after (the) witness has testified that he knows the property and its market value he may be then called upon to state what his opinion is as to the fair market value.” R. 95.

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“Mr. Chamberlin: * * * We also object to the refusal of the court to give our instructions Nos. 40, 41, and 43, those instructions having to do with market value of the oil and gas leases. We object upon the ground that the refusal to give those instructions is prejudicial error.” R. 1202.

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“The Court: Very well, all the exceptions of counsel will be noted. You may bring the jury in.” R. 1203.

10. The district court erred in refusing to instruct the jury as follows:

“Defendants’ Instruction No. 43

“The owner of mineral rights or oil and gas leases taken by the Government is entitled to just compensation therefor if they have a fair market value at the time of taking although they may be in undeveloped territory and there is only a reasonable possibility of successful development.” R. 97.

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“Mr. Chamberlin: * * * We also object to the refusal of the court to give our instructions Nos. 40, 41, and 43, those instructions having to do with market value of the oil and gas leases. We object upon the grounds that the refusal to give those instructions is prejudicial error.” R. 1202.

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“The Court: Very well, all the exceptions of counsel will be noted. You may bring the jury in.” R. 1203.

11. The district court erred in refusing to instruct the jury as follows:

“Defendants’ Instruction No. 44

“If you find and believe from the entire testimony that any of the witnesses as to value have magnified or exaggerated the value, or on the other hand have minimized or diminished the value on account of his or her interest in the

action or in the property, or his or her prejudice, lack of candor or want of knowledge or lack of familiarity with the property or from lack of experience or lack of trustworthiness, or for any other reason, then it is your duty to reject the evidence of such witness or witnesses insofar as you believe the same to have been exaggerated or minimized. You must arrive at your verdict from what you find to be a preponderance of the credible evidence as to the amounts of money the defendants are entitled to receive as just compensation for the loss to him or her or it, occasioned by the taking of the property involved in this action on the dates specified." R. 96-97.

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"Mr. Chamberlin: * * * Then your Honor gave the instructions on expert witnesses, commenting upon the expert witnesses for the defendants, on the theory that their estimates were extravagant. We think we were entitled to our instruction No. 44 to this effect: If you find and believe from the entire evidence that any of the witnesses as to value——

The Court: I have No. 44. I do not think it will be necessary for you to read it. I will identify it by number.

Mr. Chamberlin: I object to the refusal of the court to give that part of Instruction No. 44 which reads, 'Or, on the other hand, have minimized or diminished the value.' In other words, the instruction as given magnifies the overstatement and we have no comment upon understatement." R. 1201.

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“The Court: Very well, all the exceptions of counsel will be noted. You may bring the jury in.” R. 1203.

12. The district court erred in refusing to instruct the jury as follows:

“Defendants’ Instruction No. 45

“A judge of the court, presiding in the trial of an action, is authorized, within proper bounds, to comment to the jury on the credibility of any witness and on any other phase of evidence.

I would caution you that it is your right and duty to exercise the same independence of judgment in weighing the judge’s comment on the evidence as you are entitled to exercise in weighing the testimony of the witnesses and the arguments of counsel.

You will keep in mind that you are the exclusive judges of the credibility of the witnesses and of all questions of fact submitted to you. Such authority as the trial judge has to express his personal thought on any of these matters is confined to the sole purpose of aiding you in arriving at a verdict, and may not be used, and is not used in this case, to impose his will upon you or to compel a verdict.” R. 98.

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 “Mr. Chamberlin: * * * We also object to the refusal of the court to give our instruction No. 45. Your Honor covered that largely, but you omitted a cautionary provision, that is, the second paragraph of our Instruction No. 45, whereby the jury should have been told that they were entitled to consider your Honor’s remarks no

greater in weighing the testimony of the witnesses than the arguments of counsel. Your Honor neglected to give that." R. 1201-1202.

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"The Court: Very well, all the exceptions of counsel will be noted. You may bring the jury in." R. 1203.

13. The district court erred in denying appellants' motion for a new trial.

ARGUMENT.

1. THE COMPENSATION AWARDS ARE INADEQUATE AS A MATTER OF LAW AND ARE NOT JUST COMPENSATION.
(Specification of Error No. 1.)

As to the appellant Cal-Bay Corporation, the property taken by appellee was its leasehold interest in parcels 57, 58, and 59 under oil and gas leases. The well called Faria No. 1 was on part of these parcels and 632 shareholders of the company had invested over \$250,000 in the well with the approval of the Division of Corporations of the State of California. That the well was in an oil or gas bearing area, is not susceptible to doubt on the present record. Nor may be doubted that in the drilling of the well natural gas of commercial quality was discovered in volumes increasing as the well penetrated deeper. Actual demonstration by appellant Cal-Bay Corporation that it had discovered natural gas of commercial quality *in commercial quantities* became impossible, of course,

when the appellee dispossessed appellant Cal-Bay Corporation in January, 1945.

It is therefore obvious in this case that for the public use reflected by an ammunition dump or powder magazine, the appellee destroyed an investment of over \$250,000 by appellant Cal-Bay Corporation in the property it held under oil and gas leases, and destroyed its leasehold interest which included surface and subsurface rights and rights to 87½% of the value of all oil removed from the leased property and 87½% of the net proceeds from the sale of gas from wells thereon. For all this destruction the jury awarded appellant Cal-Bay Corporation the pittance of \$926. R. 1212.

But the destruction was even more devastating. The part taken by appellee in parcel 59 was severed from a larger tract held under the same oil and gas lease by appellant Cal-Bay Corporation. The entire tract was used and treated as an entity. That an element of value arose out of the relation of the part taken to the entire tract, is clear. To hold the lease on the part remaining it would be necessary for Cal-Bay Corporation to drill another well in the same general district (this time alongside an ammunition dump or powder magazine) and to face another expenditure of over \$250,000. That some damage was caused appellant Cal-Bay Corporation by the severance, is equally clear. (*United States v. Miller*, 317 U. S. 369, 376, 63 S. Ct. 276, 281, 87 L. Ed. 336.) For this latter destruction, however, the jury awarded appellant Cal-Bay Corporation nothing. R. 1212-1213.

As to the appellant Joseph Faria, Jr., his case parallels that of the appellant Cal-Bay Corporation with the exception that he had not drilled a well on the properties he held under lease. But under his leases the well drilled by the appellant Cal-Bay Corporation inured equally to his benefit. What has been said respecting that appellant therefore applies to him. Yet the jury awarded him the pittance of \$517 for the destruction of his leasehold interest and nothing by way of severance damage. R. 1213.

As to the appellant Maria Faria, the case is different. When the action was commenced she was the owner of parcel 59 containing 440.87 acres. She had leased 367.36 acres thereof under oil and gas lease to the appellant Cal-Bay Corporation, and from this acreage the appellee severed and took 208.83 acres and left 158.53 acres remaining. She had leased 73.51 acres thereof under oil and gas lease to the appellant Joseph Faria, Jr., and from this acreage the appellee severed and took 63.91 acres and left 9.60 acres remaining. A stipulation with the appellee before the trial had narrowed her claims at the trial to the value of her mineral rights under the leases and to severance damage. Her mineral rights under the leases consisted not only of a royalty interest in oil and gas recovered but also of a reversionary interest in the entire mineral rights. Her mineral rights required the drilling of a well and such well had been drilled on the property under lease at a cost of over \$250,000. Her mineral rights contemplated the eventual drilling of a well on each 20 acres under

lease. That her mineral rights in the 272.74 acres of oil or gas bearing lands were of a very substantial value, is clearly evident. And equally evident is her damage by severance. Yet the jury awarded her the inadequate sum of \$2312 for her mineral rights and nothing at all for severance damage. R. 1212.

As to the appellants Edward Faria and Mae E. Roche, each was a lessor possessing mineral rights under an oil and gas lease to appellant Cal-Bay Corporation, each of 5 acres or approximately so, one in parcel 58 and the other in parcel 57. Neither was affected by any severance. The tabulation earlier made shows that they produced evidence at the trial establishing the value of their respective mineral rights at \$300 each. The jury awards of \$50 and \$60 were obviously inadequate. R. 1212-1213.

Cases involving the condemnation of leasehold interests under oil and gas leases or the condemnation of mineral rights are not common in the federal reports. In *Montana Ry. Co. v. Warren*, 137 U. S. 348, 11 S. Ct. 96, 97, 34 L. Ed. 681, the Supreme Court spoke on the subject as follows:

“The claim in controversy has been developed so far as to indicate that possibly, perhaps probably, the same rich vein extended through its territory. It had not been developed so far that this could be affirmed as a fact proved. The strip ran lengthwise through the claim; and upon the trial witnesses were permitted to testify as to their opinion and judgment of its value. It may be conceded that there is some element of uncertainty in this testimony, but it is the best of

which, in the nature of things, the case was susceptible. That this mining claim which may be called 'only a prospect,' had a value fairly denominated a 'market value,' may be, as the Supreme Court of Montana well says, be affirmed from the fact that such prospects were the constant subject of barter and sale. Until there has been full exploiting of the vein, its value is not certain, and there is an element of speculation, it must be conceded, in any estimate thereof. And yet uncertain and speculative as it is, such prospect has a market value; and the absence of certainty is not a matter of which the railroad company can take advantage when it seeks to enforce a sale. Contiguous to a valuable mine, with indications that the vein within such mine extends into this claim, the railroad company may not plead the uncertainty in respect to such extension as a ground for refusing to pay the full value which it has acquired in the market by reason of its surroundings and possibilities. In respect to such value, the opinions of witnesses familiar with the territory and its surroundings are competent. At best, evidence of value is largely a matter of opinion, especially as to real estate."

And in *Eagle Lake Improvement Co. v. United States*, 5 Cir., 141 F. 2d 562, at page 564:

"* * * a mineral lease is recognized by law as being property having a market value even if it covers undeveloped territory. Where oil interests are involved, a reasonable probability of successful development is sufficient to make leasehold estates of great value; indeed, where there is a reasonable possibility of production in paying

quantities, mineral rights are a common subject of barter and sale, and therefore have a definite, ascertainable market value, even where the prospects of successful development are too speculative and remote to be 'reasonably probable.' "

In *United States v. Causby*, 328 U. S. 256, 261, 66 S. Ct. 1062, 1065-1066, it was declared that "It is the owner's loss, not the taker's gain, which is the measure of the value of the property taken".

An application of the foregoing rules to the evidence leaves no doubt that the compensation awards are inadequate as a matter of law and are not just compensation, or, otherwise stated, that the verdicts and judgment are not supported by the evidence.

2. APPELLANTS WERE DENIED A FAIR TRIAL AND DUE PROCESS OF LAW BY THE ACTS AND CONDUCT OF THE TRIAL JUDGE. (Specification of Error No. 2.)

The trial judge was an avowed partisan at the trial. When counsel for appellant stated during the course of trial and outside the presence of the jury, "throughout the trial of this case your Honor has had a somewhat partisan outlook on the litigation before you", the trial judge replied, "Not until I heard the opinion testimony offered by the defendants". R. 1140.

On the subject of value, the appellants offered the opinion testimony of Joseph Faria, Jr., John H. Wents, Jr., and William G. Bradford, in the order given. No partisan attitude was exhibited by the

court when the testimony of Joseph Faria, Jr. was adduced. But at the conclusion of the testimony of John H. Wents, Jr., the following occurred (R. 850-857):

“Mr. Bourquin: That is all, sir.

Mr. Scampini: That is all.

The Court: Just a moment, Mr. Wents, there is a matter I would like to inquire about. I do not recall in your testimony whether you valued the royalty interest of Maria Faria. One figure you gave us was you valued the royalty interest of Maria Faria in the 208.83 acre tract at \$65,250. I wonder if you could get to that figure that you have there.

The Witness: Yes.

Q. (By the Court): Now, so that the Jury and the Court may understand what you mean by that, you are referring to the interest reserved by the lease to Mary Faria?

A. The one-eighth of the net proceeds from production which was reserved by each of these leases with respect to the valuation of the royalty.

Q. The Cal Bay Corporation took a lease of the property of Maria Faria?

A. That is correct, your Honor.

Q. And they were to get all the oil that came out of the well except one-eighth?

A. They were to get seven-eighth for the operating.

Q. And Maria Faria was to get one-eighth of that oil?

A. One-eighth.

Q. And that is referred to as her royalty interest, is that right?

A. That is her royalty in either oil or gas, whichever be produced.

Q. When you gave your opinion that her one-eighth interest in the oil or gas to be produced had a value of \$62,500, were you then indicating that that was the present value that you attached to her one-eighth interest in the oil or gas?

A. What her royalty interest might be sold for in the open market based upon going prices.

Q. That would be the present value of the future return, would it not?

A. No, it would be the market value rather than the present value, because——

Q. The market value, then, of the future return?

A. Yes.

Q. In other words, one who goes into the market to buy a royalty of a lessor would pay for it something that would be less than the total amount that over the years would be returned?

A. He would expect interest on his money and a profit on his investment.

Q. Exactly, so if, for instance, you were buying an oil royalty of a lessor—I think you said you worked for the Pacific Western Oil Company and Mr. Geddy?

A. Yes, I have.

Q. Would you have advised him to have paid presently, that is, at that time, \$62,250 for Maria Faria's one-eighth interest in the oil and gas to be produced from this property?

A. Yes, your Honor, because——

Q. How would you possibly be able to calculate the value of the lessor's oil royalty without having some production basis upon which to make that calculation?

A. There are hundreds of transaction, your Honor, in oil royalty interests prior to the date

when production has been established. In other words, it is a commodity which is bought and sold on the open market.

Q. But how would you figure how much you would pay for a future return on oil when you would not know how much oil was going to be produced from that property or have any basis for calculating it?

A. That is purely a price which has been arrived at by trading in this. The trader in these interests—in other words, we are assuming that the man who buys has a knowledge of what he is buying, and the man who sells has a knowledge of what he is selling, and those people have made these transactions prior to that time. If they fail on one transaction they gain on another. In other words, in an unproven royalty (the amount) paid is only a fractional part of that which would be paid for a proven royalty.

Q. I understand. What you mean is that one undertakes to pay out money in the open market to buy a lessor's royalty in a property that is yet unproven, that is speculative.

A. It was speculative. In other words, your Honor, the acre per cent may be worth anywhere from a few dollars to \$25 on an unproven royalty, but in a proven royalty it may go up in hundreds of dollars per acre per cent.

Q. Suppose you had an oil royalty of a lessor and you had a production record to show that the property produced so much oil; you would then be able to calculate the longevity of the production, wouldn't you?

A. Yes, your Honor.

Q. And if you are able to show that over a period of years the property might produce for

the lessor \$100,000 in future returns, what would be the factors that you would take into account in determining that that property might produce \$100,000 for the lessor over a period of years?

A. What were the factors I would take into consideration in arriving at the \$100,000 figure?

Q. Yes.

A. I would take into consideration the past productive history of the wells; I would take into consideration the thickness and the saturation of the sands—in other words, I would arrive at a volumetric figure of the possible production or probable production in barrels. I would then translate that probable production in barrels to dollars.

Q. Would you take into account how much the oil or gas was selling for at the time?

A. That is it. I would translate the barrels of oil or gas into dollars.

Q. At the price that it was then selling for?

A. The present price is the price we use.

Q. Would you make any allowance for changes in prices during the period that the one who bought the royalty would be expecting to get a return for it?

A. Not so long as the price as of the date of my valuation was not disproportionate, either above or below the mean average price.

Q. Would you take into account factors of uncertainty, such as calamities, catastrophe or damage to the oil field or gas fields of the property were located?

A. In some degree, yes.

Q. And that is known, isn't it, as the discount factor?

A. No, it is not, your Honor.

Q. What is the discount factor?

A. I did not employ my discount factor as a hazard factor. I employed my factor as a money worth factor. Some engineers use a higher discount rate as a compensating factor. I do not believe in that.

Q. I just want to get this clear in my mind, then, the figure that you gave here as to what you would be willing to advise Mr. Geddy, whom I am told is a very experienced oil man, the figure of \$65,250 that you would recommend to Mr. Geddy to pay for Maria Faria's one-eighth royalty interest in these 208.83 acres is not calculated upon any known factors that have to do with production and the like?

A. It is calculated on trading factors in comparable acreage, your Honor. In other words, that is the answer, because we can't use any other method of approach, and there are hundreds of trades. There are large organizations that deal in that.

Q. How would you know how to recommend to Mr. Geddy to pay \$65,000 for this one-eighth royalty if he did not know what he could expect to get out of the production of gas and oil?

A. Your Honor, I am a geologist, too, I could point out to Mr. Geddy the possibility for production on that property, and make comparisons between that property and other properties. I could also point out to Mr. Geddy that the price he would be paying for this royalty on the basis of my calculations would not exceed \$25 per acre per cent, some of it much lower, and I could point out to him that the going price for comparable royalties was higher than that figure.

Q. Then the basis of your estimation or appraisal here in this royalty matter is purely on a speculative basis?

A. That is the basis of the appraisal of lands of this type.

Q. Not, though, where they are proven?

A. Oh, this is not proven, according to my estimation. Proven means that the property is on production. That is my definition of proven.

Q. You might also, might you not, Mr. Wents, have a sand that had been developed to a depth, and by coring, you could determine to a reasonable extent from the porosity of the sand the probable contents, couldn't you?

A. We can't get the porosity of the sand except by comparison, your Honor. We could prognosticate or estimate.

Q. Perhaps I am getting a little too technical. There are ways, before production actually starts, of determining within reasonable limits from the depths and character of an oil or gas sand actually encountered and drilled through the reasonable probabilities of production from it?

A. Yes, there is.

Q. That is not the case here, of course?

A. Yes, it was the case here. The reasonable possibilities for production were known, in my estimation.

Q. The well had not been drilled to a point where you were able to say that the well had penetrated seventy, eighty, ninety, one hundred or one hundred and twenty-five feet of designated sand?

A. In my opinion your Honor——

Q. But the well had not been drilled to that point?

A. Your Honor, may I explain something in that connection?

Q. Just answer my question first.

A. The well had not been drilled to that point at that time. However, your Honor, the well had been drilled to a depth to give us the marker points whereby the geologists could estimate the depth at which things could be encountered with a very fine degree of error.

Q. It is on that speculative basis that you have stated that you based your valuation of this oil royalty?

A. Yes, it is, your Honor.

The Court: I am sorry to have taken up so much of the time of Counsel in this matter, but I wanted to find out the basis upon which—a matter that was not touched by Counsel—the royalty was calculated by the witness.”

At the conclusion of the testimony of William G. Bradford, the following occurred (R. 905-908):

“The Court: I just wanted to ask a question about this royalty.

Q. You valued the $12\frac{1}{2}$ per cent interest of Maria Faria in this lease, you told me the other day, at \$41,600. That is about at the rate of \$3,500 a per cent, isn't it?

The Witness: Your Honor, I figured it at \$200 an acre to buy the entire $12\frac{1}{2}$ per cent, if she was going to sell her entire interest.

The Court: If she had a $12\frac{1}{2}$ per cent interest you were going to buy it for \$41,600, that would be at the rate of about \$3,500 a per cent.

A. That is right.

The Court: Where has anybody in California ever paid a \$3,500 a per cent for a landlord's

interest in a gas lease where the land was not proven?

A. Your Honor, I just sold one——

The Court: Can you answer that?

A. Yes, I have bought it and sold it for that.

The Court: Where was this?

A. I sold one, a wildcat drilling, sold it to the Seaboard Oil, a matter of record here, in the last three months, \$3,500 for one per cent in three and a half acres.

The Court: Unproven land?

A. It was unproven, your Honor.

The Court: Will you tell me who made that lease, the parties to it, and when it was done?

A. Yes, sir, I will. The Petroleum Corporation and the Producers Oil are owners. They are San Francisco people here.

The Court: Are you telling me that the Seaboard Oil Company pay you \$3,500 a per cent for a lessor's royalty in an unproved piece of land?

A. Your Honor, Mr. Scampini——

The Court: Just answer that question.

A. Yes, sir, they paid more than that.

The Court: The Seaboard Oil Company for a lessor's interest paid \$3,500 a per cent for an unproved piece of land?

A. Yes, sir, they did.

The Court: I just can't believe you are telling the truth on that.

Mr. Scampini: Your Honor, I will cite your Honor to the corporation permit on the subject before the Corporation Department. I will give your Honor the number of the transaction.

The Court: I asked a very definite question of the witness and he has answered it. We will leave it go at that.

The Witness: I certainly did.

Mr. Scampini: We offer to prove at this time the records of the transaction and bring the records of the transaction and offer them in evidence. One per cent, if it please the Court, sold for over \$6,400, one per cent in three and a half acres. The nearest well being drilled was a mile and a half away, and it ended up in a dry hole, your Honor, and the Seaboard (paid) the cash to the Corporation Department in November of last year.

The Court: For a lessor's——

Mr. Scampini: For a lessor's interest of one per cent.

The Court: Well, I do not know what has happened to our Corporation Department in the State of California. That is all I can say.

Mr. Scampini: If it please the Court, the Seaboard Company——

The Court: I am sorry to have made this comment. I will tell the Jury to disregard it. It is just a comment of the Court.

Mr. Scampini: I ask now to offer evidence in support of the statement of Mr. Bradford in answer to your Honor's question, and I also protest for the purposes of the record, your Honor's comments in respect to the Corporation Department as being prejudicial to our case before this Jury.

The Court: I will tell the Jury to disregard the Court's statement. The comment of the Court was on the weight of the evidence and the Jury is not bound by it. The Jury can decide the case if and when it comes time for the Jury to decide the case, according to their own lights and according to the instructions the Court may give them at the time. The Court, of course, has a right to make comments as to the weight of the evidence,

but the jury is not bound by what the Court says in that regard. It may form its own judgment. Does that instruction cover what you have in mind?

Mr. Scampini: Yes, your Honor. Thank you."

The witness John H. Wents, Jr. was later recalled for further recross-examination by the plaintiff's counsel, R. 908, and at the conclusion of his testimony the following occurred (R. 926-927):

"The Court: * * * I just want to ask another question. I wanted to satisfy my curiosity as to some of these matters of royalty interest I think you said that you appraised the royalty interest of Maria Faria at $12\frac{1}{2}$ per cent in the 208-acre tract at \$65,250.

A. I believe something like that.

Q. That is at the rate of \$5000 a per cent, approximately?

A. Yes.

Q. Do you happen to know what the highest rate per cent that has ever been paid for lessors' royalty interest in the State of California is?

A. No, I don't but I know of a sale as high as \$140,000 a per cent in land not proven yet. That was at Coalinga.

Q. Do you know what was the highest per cent that has ever been paid the lessor royalty interest in either the Kettleman fields or Coalinga was?

A. \$140,000 in Coalinga. With respect to leasehold interest in Kettleman Hills the Amerada Petroleum Corporation purchased from the Union Oil Company one-half of a 160-acre lease for the sum of eight million dollars, four million dollars in cash and four million dollars out of oil.

Q. That was on the basis of a property already proven?

A. No, that had not been drilled at the time of the sale.

Q. It hadn't been drilled?

A. No, not that particular lease, had not been drilled at the time, according to the information I have. That was the Amerada King lease.

The Court: I have no further questions."

The above excerpts may be considered from two aspects. The first aspect is that the trial judge became an avowed partisan against the appellants because of some personal and uncommunicated knowledge or belief or experience of his own touching oil and gas matters. It was not because of any evidence in the record that he openly branded appellants' expert witness Bradford a prevaricator and discredited him before the jury because the witness testified that the Seaboard Oil Company had paid more than \$3500 a per cent for a lessor's royalty interest in unproved land. It was not because of any evidence in the record that he branded appellants' expert witness Wents a prevaricator and discredited him before the jury because the witness testified that as high as \$140,000 a per cent had been paid in California for an interest of such character. And it was not because of any evidence in the record that the trial judge castigated the Division of Corporations of the State of California when appellants' counsel offered to prove that the Division had approved the sale of an interest of such character for over \$6400 a per cent.

It is perhaps unnecessary to say that when a trial judge draws upon his own personal and uncommuni-

edicated knowledge, belief, or experience to condemn expert witnesses, a litigant is rendered helpless. He is uninformed as to what is locked up in the judge's mind. His counsel cannot interrogate the judge before the jury and probe the source and soundness of the trial judge's knowledge or lack of it. Certain it is, however, that the resulting situation is incompatible with the fair and impartial trial and due process of law to which every litigant is entitled. On this aspect it is enough at this point to cite the case of *Quercia v. United States*, 289 U.S. 466, 468-472, 53 S.Ct. 698, 699-700, 77 L.Ed. 132. Quotations therefrom will be made in the arguments addressed to the jury charge.

The second aspect is that the trial judge became an avowed partisan through a misconception of law. His interrogation of the expert witnesses for appellants on value was directed to showing that their opinions on value were speculative. He later told the jury that their opinions were "so exaggerated as to make the testimony of those witnesses incredible". R. 1188. But cases earlier cited declare the law in cases like the present that opinions on value may be speculative and of necessity must be so. (*Montana Ry. Co. v. Warren*, 137 U.S. 348, 11 S.Ct. 96, 34 L.Ed. 681; *Eagle Lake Improvement Co. v. United States*, 5 Cir., 141 F. 2d 562.)

Whether either or both of these aspects prompted the trial judge to become an avowed partisan, is immaterial, for in any event the result was to deny appellants a fair and impartial trial and the due process of law demanded by the Constitution.

3. THE TRIAL JUDGE BECAME A PARTISAN AND EXCEEDED THE BOUNDS OF PROPER COMMENT IN THE JURY INSTRUCTIONS. (Specifications of Error Nos. 3, 4, 5.)

In an opening part of the charge the court told the jury that "Ordinarily the Court is not permitted to invade the province of the Jury in determining the facts of the case". R. 1176. This was error. In no instance is the Court permitted to invade the province of the jury in determining the facts of the case. The natural tendency of the instruction was to mislead the jury into believing that the case before them was an exception to the ordinary rule. It was a confusing instruction to preface a jury charge in which the court was to later comment that "In the opinion of the court the values fixed by the expert witnesses produced by the defendants in this case appear to the court to be so exaggerated as to make the testimony of those witnesses incredible", and that "The reason why the court has expressed the opinion is that it appears to the court that there is no factual basis presented in the testimony of the expert witnesses for the defense upon which the opinion of value given by them can be said to rest". R. 1188-1189. The court then proceeded to single out jury arguments made by counsel for the appellants and to answer them. R. 1191-1192. And finally, to state that "The total claims of values of the defendants are set forth at \$786,225, and the highest value as fixed by the Government with respect to those same claims is \$3,865. R. 1193. In this latter connection the court stated the claims as made by the answers of the appellants, rather than the values as fixed by their expert witnesses at the trial. For example,

the tabulation earlier made shows that the total of the values as testified to by appellants' witness John H. Wents, Jr. amounted to \$662,355 of which \$234,000 was given as the value of the well on parcel 59. R. 799. In other words, a fair statement or summary of appellants' evidence on values would have substituted the figures \$428,355 in place of the figures \$786,225 which the court used in contrast with the \$3865 as fixed by the evidence for the appellee.

There can be no escape from a conclusion that the comments of the court in the jury charge exceeded their proper bounds, and were partisan, argumentative, and distortive of the appellants' case. The controlling law is found in *Quercia v. United States*, 289 U.S. 466, 53 S.Ct. 698, 77 L.Ed. 1321, where it was said, commencing at page 469 of the official report:

(469) "In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. In charging the jury, the trial judge is not limited to instructions of an abstract sort. It is within his province, whenever he thinks it necessary, to assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence, by drawing their attention to the parts of it which he thinks important, and he may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination. * * * This privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be

exercised in conformity with the standards governing the judicial office. In commenting upon testimony he may not assume the role of a witness. He may analyze and dissect the evidence, but he may not either distort it or add to it. His privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguards against abuses. The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.' This court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence 'should be so given as not to mislead, and especially that it should not be one sided'; that 'deductions and theories not warranted by the evidence should be studiously avoided.' * * * (471)

In the instant case, the trial judge did not analyze the evidence; he added to it, and he based his instruction upon his own addition. * * * (472)

He did not review the evidence to assist the jury in reaching the truth, but in a sweeping denunciation repudiated as a lie all that the accused had said in his own behalf which conflicted with the statements of the government's witnesses. This was error and we cannot doubt that it was highly prejudicial. Nor do we think that the error was cured by the statement of the trial judge that his opinion of the evidence was not binding on the jury and that if they did not agree with it, they should find the defendant not guilty. His definite and concrete assertion of fact, which he had made with all the persuasiveness of judicial utterance, as to the basis of his opinion, was not withdrawn. His characterization of the manner and testimony

of the accused was of a sort most likely to remain firmly lodged in the memory of the jury and to excite a prejudice which would preclude a fair and dispassionate consideration of the evidence.
 * * * The judgment must be reversed.”

4. **ERRONEOUS FORMS OF VERDICT WERE SUBMITTED TO THE JURY RESPECTING APPELLANTS MARIA FARIA, EDWARD FARIA, AND MAE E. ROCHE. (Specification of Error No. 6.)**

Under the stipulations entered into between the appellee and said appellants they were entitled to just compensation for the taking of their mineral rights under their respective oil and gas leases. It has previously been pointed out that their mineral rights were greater than their royalty interests thereunder. Nevertheless, and over the objections of appellants, the forms of verdict submitted to the jury by court referred only to market value of the lessor or royalty interest. R. 1195-1196, 1202-1203. This was error. The pittances awarded said appellants by the jury demonstrates the prejudice of the error.

5. **THE COURT ERRED IN REFUSING TO GIVE APPELLANTS' REQUESTED INSTRUCTION ON BURDEN OF PROOF. (Specification of Error No. 7.)**

As the burden of proof rested upon appellants at the trial to prove market value, it was essential to their case that the jury be fully and fairly instructed on burden of proof. In sustaining the burden of proof, the law did not require of appellants demon-

stration, that is, such degree of proof as, excluding all possibility of error, produces absolute certainty. The case was of a type which demanded such an instruction. Appellants proposed one in the standard form approved in California practice. (Book of Approved Jury Instructions, No. 21-B.) R. 79-80. The refusal of the court to give the instruction was error and prejudicially so.

6. THE COURT ERRED IN REFUSING APPELLANTS' REQUESTED INSTRUCTIONS ON MARKET VALUE. (Specifications of Error Nos. 8, 9, 10.)

Appellants' requested Instructions Nos. 40, 41, and 43, R. 94-95, 97, applied the principles stated in the earlier quotations from *Eagle Lake Improvement Co. v. United States*, 5 Cir., 141 F. 2d 562, 564, and *Montana Ry. Co. v. Warren*, 137 U. S. 330, 11 S. Ct. 96, 34 L. Ed. 681. Each was a sound and appropriate statement of the law. Each was designed to correctly inform the jury that market value could be based on reasonable possibilities or speculative elements. The jury was told the contrary. Therefore, the refusal of each of these instructions was prejudicial error.

7. THE DISTRICT COURT ERRED IN REFUSING TO CAUTION THE JURY AGAINST TESTIMONY MINIMIZING OR DIMINISHING VALUES. (Specification of Error No. 11.)

Appellee was obligated to pay appellants just compensation and no more. It was therefore entitled to have the jury cautioned to reject testimony which it found exaggerated or magnified values. The appellee,

of course, received far more than the benefit of this rule, for on the subject the court expressed to the jury that testimony for appellants had exaggerated or magnified values and should be rejected.

On the other hand, appellants were entitled to be paid just compensation and no less. They, in turn, were entitled to have the jury cautioned to reject testimony which it found minimized or diminished values. Confronted by the partisan attitude of the trial court on the subject, their need for such instruction was particularly apparent. They accordingly requested Instruction No. 44 and the court refused it. R. 96-97, 1201, 1203.

That a further partisan stated of the jury charge thereby resulted, cannot be doubted. In effect, the province of the jury was invaded, and it was told to accept the figures of appellee's witnesses and reject those of appellants' witnesses.

Confirmation is found in a matter already discussed in a previous subdivision of this brief, namely, the summarization of claims and values submitted by the court to the jury with accompanying comments in a concluding stage of the jury charge. R. 1192-1193. The court said, "This paper will be given to you by the court to take with you into the jury room, not as evidence at all, but merely to aid the jury in having before them in concrete simple form what each side claims, so that you will not have to have recourse to the reading of a lot of testimony, and perhaps a laborious examination of many exhibits". R. 1193. The court set out the claims of appellants at the sum of \$786,225, and "the values as fixed by

the Government'' (R. 1192) at the sum of \$3865. It has been shown earlier, however, that the figure of \$786,225 does not reflect the testimony of appellants' witnesses on value, and is out of line by about \$350,000. The plain intimation to the jury was that it was to award appellants either \$786,225 or \$3865. Under such circumstances it would be idle for any one to contend that the refusal of the court to give appellants' Instruction No. 44 did not constitute prejudicial error.

8. THE DISTRICT COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE WEIGHT TO BE GIVEN OPINIONS AND COMMENTS MADE BY THE COURT TO THE JURY. (Specification of Error No. 12.)

It would appear fundamental that where a trial court exercises the privilege of expressing opinions or commenting on facts before a jury, a litigant affected thereby is entitled to have the jury informed as to the weight to be given such opinions and comments. A mere general statement that the jury is not bound by the opinions or comments of the court is inadequate to protect the rights of a litigant adversely affected thereby.

There is commonly found in most jury charges an instruction informing the jury as to the weight to be given to the arguments of counsel. One appears in the present jury charge. R. 1180. Under the law the opinions and comments of a trial judge have no greater weight than arguments of counsel. The attainment of a fair trial demands that juries be so instructed. Appellants accordingly requested Instruction No. 45 to that effect. R. 98. It contained a sound

statement of the law in the standard form approved in California practice. (Book of Approved Jury Instructions, No. 6.) The court refused to give it. R. 1201-1203. Under the circumstances of the case, this refusal was unmistakably prejudicial error.

9. **THE DISTRICT COURT ERRED IN DENYING APPELLANTS' MOTION FOR A NEW TRIAL. (Specification of Error No. 13.)**

Appellants moved for a new trial on grounds raising the points covered by the other Specifications of Error and the motion was denied. R. 136-139. They are mindful that the granting or refusing of a new trial rests in the sound discretion of the trial court. But discretion may be abused. Here an abuse of discretion in denying the motion for new trial is plainly manifest.

CONCLUSION.

Appellants respectfully submit that a miscarriage of justice occurred in the trial court and that the judgment appealed from should be reversed as to each appellant.

Dated, San Francisco,
December 17, 1947.

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WALTER E. HETTMAN,
HERBERT CHAMBERLIN,
Attorneys for Appellants.

No. 11695

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

CAL-BAY CORPORATION, MARIA FARIA, JOSEPH FARIA,
JR., EDWARD FARIA AND MAE E. ROCHE, APPEL-
LANTS

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN
DIVISION

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The district court did not write an opinion.

JURISDICTION

This is an appeal from a final judgment in condemnation entered February 28, 1947 (R. 99-135). Motion for new trial was denied April 8, 1947 (R. 138). Notice of appeal was filed April 26, 1947 (R. 140). The jurisdiction of the district court was invoked under the Second War Powers Act of March 27, 1942, c. 199, 56 Stat. 176, 177, 50 U. S. C., App. sec. 632, and the Navy Department Appropriation Act of June 22, 1944, c. 269, 58 Stat. 301 (R. 3).

The jurisdiction of this Court rests on section 128 of the Judicial Code, as amended, 28 U. S. C. sec. 225 (a).

QUESTIONS PRESENTED

1. Whether in a condemnation proceeding by the United States to acquire property on which a gas well has been drilled, the United States must pay for the investment in the well.

2. Whether in valuing unproven mineral interests in the property taken the court committed error in relation to evidence of market value based on speculation.

3. Whether under the evidence the jury was bound to find severance damages.

4. Whether the landowners were denied compensation for their reversionary interests in the minerals.

5. Whether the court exaggerated the claims for compensation.

6. Whether under the evidence the jury was bound to find that the property contained gas in commercial quantities.

7. Whether the landowners were harmed by comments of the court to their witnesses.

8. Whether the landowners' proposed instructions were given to the jury in other language.

STATEMENT

The United States instituted this proceeding to acquire approximately 5,340 acres of land near Port Chicago, Contra Costa County, California, for expansion of the United States Naval Magazine by filing a petition in condemnation on July 22, 1944 (R. 2-11).

For purposes of valuation the area was divided into numbered parcels according to ownership (R. 8-9). Of those, Parcels 57, 58, 59, and 64 are involved in this appeal.

The United States sought and was granted an order for immediate possession on July 24, 1944 (R. 11-13). However, since the drilling of an oil and gas well was under way on Parcel 59, the United States agreed to a modification of the order for immediate possession of Parcels 58 and 59, and a court order was obtained on September 28, 1944, permitting continuation of the drilling operations until thirty days after service of notice by the United States of termination of such right to possession (R. 14-16). Notice of termination was given on December 15, 1944, and possession was surrendered by January 15, 1945 (R. 16-17, 277-280, 1245).

The owners of Parcels 57, 58, and 59, stipulated with the United States as to the amounts to be awarded for their land exclusive of mineral rights under oil and gas leases affecting the parcels (R. 17-28). Pursuant thereto, in March 1945, the court awarded \$15,000.00 for Parcel 57, \$400.00 for Parcel 58, and \$26,780.00 for Parcel 59 (R. 20, 24, 28). Compensation for the owner's interest in Parcel 64 is not involved here.

The oil and gas leases referred to in the stipulations were leases which Joseph Faria and Bud Hildebrand had obtained from the owners of these parcels in 1941 (R. 184-232). They had also secured leases in 1941 and 1942 on neighboring properties. Altogether the leases covered approximately 2,100 acres

(R. 232). The leases were for twenty years and so long thereafter as oil or gas in paying quantities was produced (R. 1218). They reserved a one-eighth, or twelve and one-half percent royalty to the lessor, required the lessees to commence drilling operations within one year and to drill to a depth of 5,000 feet, to drill a new hole if a dry hole resulted from previous drillings, to drill one well on each twenty acres leased, but that, since each lease was one of a series in a general district, drilling within a year under one lease should be deemed drilling under all (R. 1217-1229).

Bud Hildebrand assigned all his interest in these leases to Joseph Faria, and Joseph Faria, in turn, organized the Cal-Bay Corporation on April 17, 1942, and assigned to it 687 acres under these leases (R. 230-232, 315). He retained 1,441 acres (R. 232).

On July 14, 1943, the drilling of a well was commenced on Parcel 59 and proceeded intermittently until July 25, 1944, when notice of the filing of this action was received (R. 233, 250-255). At that time the well had reached a depth of 4,375 feet (R. 151). After permission was given by the United States under the stipulation referred to above, to continue drilling, the well was drilled to a depth of 4,975 feet where, on November 29, 1944, a blow-out of gas collapsed the casing (R. 269, 271, 455, 458). No further drilling was done because of the condition of the well (R. 458) and the fact that notice was received from the Navy on December 15, 1944, requiring surrender of the premises by January 15, 1945 (R. 277-278). The lessees complied with the notice and re-

moved all their equipment, plugged the hole and abandoned the well by that date (R. 16-17, 277-280, 1245).

Trial to determine the values of the leasehold interests of Joseph Faria and the Cal-Bay Corporation and the mineral rights of the lessors, Maria Faria, Edward Faria, and Mae E. Roche, was had in January and February 1947, before Judge Goodman and jury (R. 147-1214).

Both sides offered the testimony of expert witnesses on the question as to whether gas in commercial quantities had been discovered or would be discovered in the structure at greater depth and as to the values of the interests condemned. In addition to the values of the mineral interests taken from them, the appellants sought damages for the severance of these properties from others in which they had mineral interests that were not taken.

The ownerships, acreages, claims, testimony of values and awards for each parcel are set forth in tabular form as an appendix to this brief. As may be seen from that tabulation, there is a marked spread between the valuations adduced by the landowners and those of the Government. This is due to the differing views of the expert witnesses for each as to the possibility that gas was present in commercial quantities beneath the properties taken and the market price for properties with the history and geologic structure of those involved here.

The court below was impressed with what seemed to it to be extreme and exaggerated claims on the part

of the landowners. During the testimony of the landowners' witnesses the court interposed questions, on three occasions, seeking more specific information than had been given as to the basis for and method of calculating their valuations (R. 850-857, 905, 908, 926-927). On one of these occasions the questioning concluded with the following (R. 856-857):

Q. It is on that speculative basis that you have stated that you based your valuation of this oil royalty.

A. Yes, it is, your Honor.

The COURT. I am sorry to have taken up so much of the time of Counsel in this matter, but I wanted to find out the basis upon which—a matter that was not touched by Counsel—the royalty was calculated by the witness.

No objection was made to this by counsel for the appellants. At another time, when the landowners' witness stated that he knew of a lessor's interest in unproven land which had been sold for \$3,500 a percent, and could prove it by the records of the Corporation Department of California, the court said: "I just can't believe you are telling the truth on that * * * I do not know what has happened to our Corporation Department in the State of California. That is all I can say." (R. 906-907.) Immediately thereafter the court apologized for those comments and upon objection by the landowner's counsel instructed the jury to disregard them (R. 907). Counsel for the landowners acknowledged that the instruction was sufficient (R. 908).

Near the close of the trial the judge summoned counsel for both sides and out of the presence of the

jury told them that he thought it fair to advise them prior to their argument to the jury that: "I feel duty bound in this case, from what I have heard, to tell this jury that in the opinion of the court the view of the so-called experts presented by the defendants is entitled to no weight whatsoever, and that the opinions that they have given are fantastic and are at a borderline, at a point where a more serious criticism could be made of them * * * I am very frankly stating the view of the court. It is not binding on the jury, and when I give it to them I shall be most specific to tell the jury that they can come to any opinion that they want on that subject, but I shall nevertheless feel it my duty, as I have had occasion to do only once before in any case since I have presided in this court, to express an opinion on the facts of the case; but I feel that my conscience prompts me in this case to make an observation to the jury as to the opinion of the court as to the weight of this evidence * * *

I am not called upon to pass upon this question yet, but if the jury were, despite the statement of the court as to its opinion as to the weight of the evidence, to bring in a verdict for any large sum in this case I would feel duty bound to set it aside, because this case does advise some technical aspects and the jury might very easily be misled. * * *

In order that the record may be quite clear, I wish to repeat again I have made this statement to counsel only for the purpose of advising them in advance, so that counsel may be free, so far as I am concerned, to tell the jury, if they wish, that the judge has already told them his opinion of the weight of the evidence, but counsel are

of a different opinion, and they feel free to tell the jury what they think about the case. I have no objection, whatsoever, to the matter being opened up, so that counsel can take, if they wish, the sting out of the judge's comment on the evidence in advance in their argument, if they wish to, and that is the purpose of my statement now." (R. 1138-1143).

Following the advance notice thus given to counsel, the court instructed the jury as follows (R. 1188-1189):

Ordinarily, ladies and gentlemen, the court, as I stated to you before, abstains from expressing opinions as to the weight of the evidence. However, due to the somewhat apparent complexities of this case, and in order to be of assistance to the jury in the proper administration of justice, I believe it is my duty to make the following comment to the jury: In the opinion of the court the values fixed by the expert witnesses produced by the defendants in this case appear to the court to be so exaggerated as to make the testimony of those witnesses incredible. The opinion that I have expressed is just the opinion of the court. A Federal judge is permitted to make such a comment to the jury. The jury is not bound by the opinion of the court. The opinion is expressed as a part of the instructions as to the law for such aid as the jury wishes to make of it in determining the factual question. The jurors individually and collectively are entitled to disagree with the opinion of the court. You may have your own opinion and you can come to it. You are not bound in any manner in making a find-

ing in accordance with the view expressed by the court. The reason why the court has expressed the opinion is that it appears to the court that there is no factual basis presented in the testimony of the expert witnesses for the defense upon which the opinion of value given by them can be said to rest.

Thereafter, on February 7, 1947, the jury returned verdicts awarding compensation for the taking of each separate interest in the properties in the highest amounts testified to by the Government's two expert witnesses (R. 63-67). Judgment was entered in accordance with the verdicts on February 28, 1947 (R. 99-135).

Appellants moved for a new trial on March 13, 1947, urging (a) irregularities in the proceedings of the court by which they were denied a fair trial, (b) inadequate damages, (c) insufficiency of the evidence to justify the verdict, (d) the verdict to be against the law, and (e) error in law occurring at the trial (R. 136-138). The court denied the motion on April 8, 1947 (R. 138). This appeal followed (R. 140).

ARGUMENT

I

The awards are not inadequate as a matter of law

Appellants contend that the awards in this case are inadequate as a matter of law and do not represent the just compensation for the taking of private property required by the Fifth Amendment to the Constitution (Br. 10, 23-28). But it is not the function of this

court to reweigh the evidence. As the court said in *Ramming Real Estate Co. v. United States*, 122 F. 2d 892, 895 (C. C. A. 8, 1941), verdicts within the range of the evidence "are conclusive of the facts and cannot be set aside on appeal as being against the weight of the evidence." *Puget Sound Power & Light Co. v. City of Puyallup*, 51 F. 2d 688, 690 (C. C. A. 9, 1931); *Miller v. United States*, 137 F. 2d 592, 594 (C. C. A. 3, 1943). In the instant case the verdict was within the range of the evidence. And as we shall show there was no error of law committed either in rulings during the trial or in the instruction to the jury.

A. *Appellants were not entitled to recover their investment in the well.*—The principal argument advanced by appellants in support of their contention has to do with recovery of the cost of drilling the well on Parcel 59. They urge in their brief that since "the appellee destroyed an investment of over \$250,000 by appellant Cal-Bay Corporation in the property it held under oil and gas leases," the awards, which clearly do not reimburse them for that expenditure, are "inadequate as a matter of law and are not just compensation" (Br. 6, 23, 24, 25). The evidence of values submitted by the appellants at the trial was also aimed to a large extent at recouping this expenditure (R. 232-233, 252-255, 281-283, 298-300, 336, 339-342, 528-530, 540, 735-738, 816, 828, 868-869, 886). The Government objected to evidence of values based on the cost of drilling the well (R. 253-254, 886), but was overruled on the ground that cost might have some bearing on values (R. 888). Thus, appellants do not

and could not complain of any ruling on evidence in this regard. Nor did they object to the instructions to the jury on this subject which were as follows (R. 1184-1185, 1189, 1191, 1192):

Compensation cannot be awarded for loss of business. The mere fact that a business is conducted on a property which has been taken under the right of eminent domain is interrupted or destroyed by the taking does not constitute a taking of property or interest for which the owner is entitled to compensation. Compensation is to be awarded for the taking of the property or interest itself as distinguished from any activity or business thereon carried on.

* * * * *

In determining the market value of the mineral rights, if any, in this parcel, you may consider the amount, if any, which the existence of this hole enhanced the market value of these rights. However, it is not within your province to evaluate the hole or to give any consideration to the cost of drilling the same or the reproduction cost thereof. You must determine, as I have already instructed you, what amount in terms of cash a willing buyer would have paid to a willing seller for the mineral rights in this parcel of land with full knowledge of all the facts, including all the facts having to do with the presence of and the drilling of this hole on the property. You are not at liberty to assess the value of the mineral rights if you find that they have a value and of the hole, and by a process of addition fix the total value of the mineral rights.

* * * * *

It has been stated to you by counsel during argument that unless compensated by a verdict of the jury the defendants will not be reimbursed for their efforts expended in connection with their gas exploration project. Such reimbursement, however, has no part in the scheme of just evaluation of the defendants' alleged mineral rights. Many explorations for gas and oil are made all over the world and in innumerable instances are unsuccessful. The Government, because of its exercise of its right of eminent domain to take this property, cannot be charged with the drilling or other expense of the defendants. It is only required to pay the market value as I have defined that term to you of the interest that was taken.

* * * * *

Likewise the amount that an owner invests in his property is not germane in determining the matter of market value. I may pay \$50,000 for a piece of property, perhaps yielding to the importunities of some glib salesman, and yet the market value of that property may be only \$10,000. If the Government takes that property, the Government is only required to pay the market value of \$10,000, no matter what I may have paid for it or invested in it, because by law just compensation always is only concerned with market value.

That instruction denying recovery of the cost of the well or other business losses correctly states the law. The Fifth Amendment does not guarantee a return of investment that may have been made in property. *United States ex rel. T. V. A. v. Powelson*, 319 U. S. 266, 285 (1943); *Foster v. United States*, 145 F. 2d

873 (C. C. A. 8, 1944); *Kinter v. United States*, 154 F. 2d 5 (C. C. A. 3, 1946); cf. *United States v. Certain Parcels of Land in Spokane*, 45 F. Supp. 899 (E. D. Wash., 1942). And as the Supreme Court said in the *Powelson* case, *supra*, pp. 281-282:

This public project, to be sure, has frustrated respondent's plan for the exploitation of its power of eminent domain. We may assume that that privilege was a thing of value and that this frustration of the plan means a loss to respondent. But our denial of compensation for that loss does not make this an exceptional case in the law of eminent domain. There are numerous business losses which result from condemnation of properties but which are not compensable under the Fifth Amendment. The point is well illustrated by two other lines of cases in this field. It is a well settled rule that while it is the owner's loss, not the taker's gain, which is the measure of compensation for the property taken (*United States v. Miller*, *supra*; *United States v. Chandler-Dunbar Co.*, *supra*, p. 81; *Boston Chamber of Commerce v. Boston*, 217 U. S. 189, 195), not all losses suffered by the owner are compensable under the Fifth Amendment. In absence of a statutory mandate (*United States v. Miller*, *supra*, p. 376) the sovereign must pay only for what it takes, not for opportunities which the owner may lose. See Orgel, *Valuation Under Eminent Domain* (1936) § 71, § 73.

Loss of profits, damages resulting from removal of personal property from land condemned, frustration of contracts relating to the property, loss of good will

and other business losses are refused in federal condemnation proceedings as being consequential. "Such losses are apart from the value of the thing taken. They are personal to the [condemnee]." *United States v. Petty Motor Co.*, 327 U. S. 372, 378 (1946). *Mitchell v. United States*, 267 U. S. 341, 345 (1925); *Joslin Co. v. Providence*, 262 U. S. 668, 675 (1923); *United States v. Bechtold Co.*, 129 F. 2d 473, 476 (C. C. A. 8, 1942); *Stephenson Brick Co. v. United States*, 110 F. 2d 360 (C. C. A. 5, 1940); *United States v. 10,620 Square Feet, Etc.*, 62 F. Supp. 115, 120 (S. D. N. Y., 1945); *United States v. 40.558 Acres of Land, Etc.*, 62 F. Supp. 98 (D. Del., 1945); *United States v. 8,286 Sq. Ft. of Space, Etc.*, 61 F. Supp. 737, 740 (D. Md., 1945); *United States v. Certain Parcels of Land*, 54 F. Supp. 561 (S. D. Cal., 1944); *Kellettville Gas Co. v. United States*, 56 F. Supp. 919, 922 (W. D. Pa., 1944).

In the instant case the court admitted all the evidence of the cost of the well and of the business venture which was offered by the appellants. The appellants cannot complain because the jury was correctly instructed as to the relevance of this evidence. Nor can they complain that the awards are inadequate in law because the jury did not reimburse them contrary to the instructions for their business expenditures. Moreover, there is credible evidence that the well with its history and undesirable mechanical condition at the date of taking was a liability to the properties rather than a benefit (R. 1088-1089, 1133).

B. *The court did not commit error in relation to testimony of value based on speculation.*—Appel-

lants also complain because, in their view, the trial court misapplied the law in looking with disfavor upon the values testified to by their witnesses because they were grounded on speculation and conjecture (Br. 26-28, 40). In support of their conclusion that this resulted in awards "inadequate as a matter of law," the appellants rely on *Montana Ry. Co. v. Warren*, 137 U. S. 348 (1890), and *Eagle Lake Improvement Co. v. United States*, 141 F. 2d 562, 564 (C. C. A. 5, 1944), where it was said that the market value of mineral interests must in the nature of things rest on speculation (Br. 26-28, 40). However, appellants do not contend that any evidence offered by them was rejected on the ground that it was speculative. Here again all of the evidence submitted by them was considered by the jury.

Appellants' sole contention is that the court improperly interrogated appellants' witnesses to show that their opinions of value were based on speculative elements and told the jury that their valuations were "so exaggerated as to make the testimony of those witnesses incredible" (Br. 31, 35, 40, R. 1188). No law is cited which forbids the court to question a witness in order to bring out the basis for his opinion and none, in fact, exists. Nothing in the rulings on evidence, the questions and comments of the court, or the charge to the jury violated the rule in the *Montana Ry. Co.* and *Eagle Lake Improvement Co.* cases. The court admitted all the testimony of the witnesses and left the jury free to decide what evidence it believed. Just as there are degrees of cer-

tainty with which a fact may be established, there are degrees of persuasiveness. The trial court did no more than honestly state the degree to which it was persuaded by the testimony based on varying degrees of speculation in this case. It is well-settled that in the federal courts "the judge, in submitting a case to the jury, may, at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment upon the evidence, call their attention to parts of it which he thinks important, and express his opinion upon the facts; and the expression of such an opinion, when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury, cannot be reviewed." *Vicksburg, Etc., Railroad Co. v. Putnam*, 118 U. S. 545, 553 (1886); *Patton v. United States*, 281 U. S. 276, 288 (1929); *St. Louis, Etc. Railway v. Vickers*, 122 U. S. 360, 363 (1886); *Patton v. Texas and Pacific Ry. Co.*, 179 U. S. 658, 660 (1901). Appellants rely (Br. 40, 42) upon *Quercia v. United States*, 289 U. S. 466 (1932). But that was a case where the court added to the evidence and based its instruction upon such addition. Nothing like that was done here where the court merely exercised his discretion to comment upon the opinion evidence.

C. *Under the evidence the jury was not bound to find severance damages.*—Appellants further complain because the jury found that they were not damaged by the severance of the parcels taken from the other lands owned or leased by them (Br. 24–26). They do not cite the exclusion of any evidence, improper instructions, or other ruling of law by the court

below which may have been the cause of this finding by the jury. They contend generally (Br. 28) that the verdicts are not supported by the evidence. But, in opposition to appellants' evidence that large severance damages resulted from the taking, there was abundant, credible evidence offered by the Government that the remaining lands were not damaged because they embrace a substantial acreage which would give the lessees ample opportunities to locate wells and to drill them to whatever horizon they saw fit (R. 1189-1191, 1132-1133). The jury was carefully and correctly instructed on the question of severance damages (R. 1190). Under the evidence and the instructions the jury was free to award whatever damages they believed had been shown. Their opinion that no damage was suffered is a determination of fact under the evidence and is not subject to review.

D. Appellants were not denied compensation for their reversionary interests.—Appellants also complain because, they contend, the owners of the fee in the properties received awards only for their royalty interests under the leases and nothing for their reversionary interests (Br. 25, 44). They state this to be a fact and assign responsibility for it to the forms of verdicts submitted to the jury which referred only to two kinds of interests in these properties: royalty interest and leasehold estate (R. 1195, 1202-1203, Br. 44). Counsel for appellants objected to this form of verdict at the time it was submitted to the jury, but the court declined to change it because he thought there could "not be any con-

fusion on that," it was "merely a convenient way to refer to the interest," and he "was afraid that the jury might be confused when we are talking about these landlords and still referring to them as mineral interests, and they would not know that was the same kind of interest as the other defendants" (R. 1202-1203).

This contention of appellants cannot be sustained. In their opening statement to the jury they referred to the lessors' interest exclusively as a "royalty interest" in eliciting opinions of value from their witnesses they used that expression without exception, and made no objection to the same use throughout the Government's testimony. (R. 168-169, 802-804, 863, 1085-1087, 1130-1132). The entire trial was conducted on that basis. Accordingly, the court was eminently correct in believing that a change in terminology at the very last minute would confuse the jury. This is not to say that appellants were not awarded the value of that interest. They included the reversionary interest in their values under the phrase "royalty interest," for they offered no separate figures. The United States did the same. Thus, the verdicts of the jury clearly included those interests because they had no other evidence or theory of the case to rely on. Finally while the forms of the verdicts referred simply to "royalty interest" the court made it clear in its instructions to the jury that the reversionary interests were included (R. 1185).

E. *The court did not exaggerate appellants' claims for compensation.*—Appellants urge further that the

trial court erred in stating to the jury in its instructions that the appellants claimed \$786,225, the amount set forth in their answers, rather than \$662,355, the amount testified to by their witnesses at the trial (Br. 41-42, 46-47). This, they contend, was prejudicial because it erroneously exaggerated their claims for compensation. Moreover, they urge that because the \$662,355 testified to by their witnesses included \$234,000 as the value of the well, the court should have told the jury that their claims were for \$428,355 (Br. 42).¹ This, it is said, would have contrasted more favorably with the \$3,865 testified to by the witnesses for the Government. But the total compensation sought by appellants in their proposed instructions to the jury was \$786,225, which is the exact figure given to the jury by the court (R. 88-94). The court correctly told the jury that the \$786,225 was the amount of the appellants' "total claims of values" (R. 1193-1196). Moreover, contrary to their statement, the values testified to by their witnesses totaled \$782,500² instead of \$662,355. This is so close to the amount stated by the court as to make the difference negligible. And, finally, appellants made no objection to this instruction in the court below.

¹The cost of the well was included by all of appellants as a part of the property valuation (R. 816, 828, 868-869, 886, 1191). Appellants did not seek to secure a separate verdict on this item and, if allowed, it would clearly have been erroneous. See *supra*, pp. 12-14.

²Computed by adding the highest valuations testified to by their witnesses. See Appendix.

F. *Under the evidence the jury was not bound to find that appellants' properties contained gas in commercial quantities.*—Finally, appellants contend that the awards are inadequate in law, that is, not supported by the evidence, because the record shows that the well was in an oil- or gas-bearing area, that gas of commercial quality was discovered in volumes increasing as the well penetrated deeper, and that the inescapable conclusion is that gas in commercial quantities would have shown if the Government had not taken the property before the well could be drilled further (Br. 23-24). The evidence presented by the appellants, of course, was directed to establish these facts. Their witnesses contradicted each other as to whether commercial gas was shown by the blow-out (R. 710, 734-739, 810), but were unanimous in their views that there was a possibility of commercial gas underneath the lands (R. 682, 782, 811-813, 869-870). However, the case is not to be judged on appellants' evidence alone. The Government offered abundant, credible evidence to show that the traces of gas in the well were not significant and that this was not an area susceptible of commercial production of gas, because there is no anticline capable of trapping and holding gas and the structure is strongly faulted (R. 980-1126). For example, the witness Taliaferro, consulting geologist for thirty-two years and professor of geology at the University of California at Berkeley, who had personally mapped 3,800 square miles of California, including this area, and who had spent fifteen days again inspecting and mapping this prop-

erty at the request of the Navy, testified as follows (R. 987, 989):

Q. Would you consider the Cal-Bay Corporation a favorable structure in which to explore for a commercial accumulation of oil or gas?

A. Emphatically not. Had I been sent out to report on such an area, either a new area or a submission, I would never have recommended the drilling of a well in that location. In fact, I would have turned the thing down and so reported.

* * * * *

Gas in the cretaceous of northern California is exceedingly common. There are innumerable gas and oil seepages.

* * * * *

The wells do not yield in barrels per day, but in gallons per month, which you could hardly consider commercial.

That alone was sufficient evidence on the question of commercial gas to support the awards of the jury.

II

The appellants had a fair trial

The appellants list several acts and omissions of the trial judge which, they contend, showed him to be an avowed partisan and denied them a fair trial and due process of law (Br. 10-23, 28-48). These charges are without merit and may be disposed of as follows:

A. *Appellants were not harmed by the court's comments to their witnesses.*—Appellants quote at length from the record to show that the trial judge branded

their witnesses Wents and Bradford prevaricators (Br. 29-39). Nothing is present in the colloquy between the court and Wents to sustain that charge (Br. 29-35, 38-39). Counsel for appellants made no objection to the questioning of Wents at the time (R. 857, 927). Appellants concede that Wents' testimony was based on speculative considerations and argue that in the nature of things it had to be (Br. 40). The fact that the court brought this to light on the ground that it was "a matter that was not touched on by counsel" was, therefore, not error. If this adversely affected the jury's opinion of this witness and if opinions of value in this case must necessarily be based on speculation, counsel for appellants was at liberty to cancel out the effect by later cross-examining the witnesses for the Government to show the extent to which they relied on unproven facts.

The situation as to Bradford is somewhat different. After that witness had said that he knew of a sale of a lessor's interest in a gas lease on unproven property for \$3,500 a percent, the court said: "I just can't believe you are telling the truth on that," and "Well, I do not know what has happened to our Corporation Department in the State of California" (Br. 36-37, R. 906-907). Counsel for appellants objected to this as prejudicial to their case (Br. 37, R. 907). The court stated at that time in the presence of the jury (Br. 37, R. 907):

I am sorry to have made this comment. I will tell the jury to disregard it. It is just a comment of the Court.

*

*

*

*

*

I will tell the jury to disregard the Court's statement. The comment of the Court was on the weight of the evidence and the Jury is not bound by it. The Jury can decide the case if and when it comes time for the Jury to decide the case, according to their own lights and according to the instructions the Court may give them at that time. The Court, of course, has a right to make comments as to the weight of the evidence, but the jury is not bound by what the Court says in that regard. It may form its own judgment. Does that instruction cover what you have in mind?

Counsel for appellants replied: "Yes, your Honor. Thank you." Later, at the conclusion of the trial, the Court elaborately repeated this instruction (R. 1176-1177, 1180, 1188-1189, see *supra*, p. 8). Under these facts it is not perceived how the jury could have failed to understand that the comments of the court were not to affect their verdict if they held a contrary view of the weight of the evidence. If the Court "promptly instructs the jury to disregard the unjustified statements, it cannot well be assumed that the jury took no heed of the withdrawal and disobeyed the positive mandate of the court." *Washington & O. D. Ry. Co. v. Dulany*, 288 Fed. 421, 427 (App. D. C. 1923); *Gregory v. Morris*, 96 U. S. 619 (1877). The court was, we submit, eminently fair to appellants in his conduct of trial. He gave appellants ample warning of the comments he proposed to make upon the evidence and was extremely careful to advise the jury that it was not bound by his comments. Acceptance of appellants' contention would, in effect, nullify the

judge's duty to comment on the evidence where, in his opinion, the proper administration of justice requires it.

B. *Appellants' proposed instructions were given to the jury in other language.*—Appellants complain that the court erred in refusing to give their proposed instruction to the jury that the preponderance of the evidence does not require “such degree of proof as, excluding all possibility of error, produces absolute certainty, because such proof is rarely possible” (Br. 44–45, R. 79). That proposed instruction was not necessary. The court correctly and completely defined the burden of proof for this case by stating (R. 1179–1180): “The preponderance of the evidence means that the testimony of the defendants as to the value of the land or property or interest taken must have greater weight in your opinion and more convincing effect than that of the plaintiff.” Cf. *Spreckels v. Brown*, 212 U. S. 208 (1908); *Sebastian Bridge Dist. v. Missouri Pac. R. Co.*, 292 Fed. 345 (C. C. A. 8, 1923).

Appellants urge that the court erred in not giving their proposed Instructions Nos. 40, 41, and 43 to the effect that market value could be based on speculative elements (Br. 45, R. 94–95, 97). That instruction was not necessary. The court fully and correctly defined market value as “the highest value in terms of money which the property or interest will bring if exposed to sale for cash in the open market in the community in which it is situated, with a reasonable time to find a purchaser buying with full knowledge of all the uses and purposes to which it is adapted and for which it

is capable of being used, the seller not being required to sell or the buyer not being required to buy at the time" (R. 1182-1183, 1189).

Appellants contend that the court erred in refusing their Instruction No. 44 to the effect that the jury should reject testimony which it found minimized or diminished values (Br. 45-47). The ground for this is that the court's comment concerning the exaggerated values of the appellants' witnesses required counterbalance (Br. 46). Their proposed instruction was not necessary. As we have shown, the court gave a careful and correct definition of the market value which the jury was to find (R. 1182-1183, 1189). The court's comment on the evidence was carefully set apart and put in proper perspective by the repeated statements that the jury was free to disagree with it. If the court is required to counterbalance each comment it makes upon the evidence its right to comment thereon would be meaningless.

Appellants' charge that the court committed "unmistakably prejudicial error" in not giving their proposed Instruction No. 45, to the effect that "comments of a trial judge have no greater weight than arguments of counsel" (Br. 47) is clearly without merit in view of the careful and repeated instruction that the "jurors individually and collectively are entitled to disagree with the opinion of the court" (R. 1188-1189).

Appellants were not entitled to every instruction they offered. As the Supreme Court said in *Railway Co. v. McCarthy*, 96 U. S. 258, 265 (1877): "It has been repeatedly determined by this tribunal that no court is bound to give instructions in the forms and

language in which they are asked. If those given sufficiently cover the case, and are correct, the judgment will not be disturbed, whatever those may have been which were refused." See also *Indianapolis, Etc. R. R. Co. v. Horst*, 93 U. S. 291, 295 (1876).

Finally, it is apparent from the foregoing that the court did not, as appellants contend (Br. 48), abuse its discretion in denying their motion for a new trial.

CONCLUSION

It is submitted that the judgment below is correct and should be affirmed.

Respectfully.

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FEBRUARY 1948.

APPENDIX

Tabulation of *ownerships, acreages, claims, valuations and awards*

	Acres leased	Leased acres taken	Leased acres not taken	Testimony as to values						
				Claim	Appellants' witnesses			Government's witnesses		
					J. Faria	Wents	Bradford	Armstrong	Paine	Awards
Parcel 57:										
Cal-Bay	(R. 196)			(R. 44)	(R. 290)	(R. 800)	(R. 862)	(R. 1086)	(R. 1130)	(R. 65)
Leaschold	4. 96	All	None	\$3, 850	\$5, 000	\$3, 850	\$5, 000	\$10	\$60	\$60
Mao E. Roche	(R. 196)			(R. 49)	(R. 198)	(R. 805)	(R. 864)	(R. 1086)	(R. 1130)	(R. 67)
Mineral rights	4. 96	All	None	\$3, 500	1 \$3, 500	\$300	\$1, 000	\$25	\$60	\$60
Parcel 58:										
Cal-Bay	(R. 192)			(R. 44)	(R. 289)	(R. 800)	(R. 862)	(R. 1085)	(R. 1131)	(R. 65)
Leaschold	5	All	None	\$3, 900	\$5, 000	\$3, 875	\$5, 000	\$10	\$30	\$30
Edw. Faria	(R. 192)			(R. 61)	(R. 194)	(R. 804)	(R. 863)	(R. 1085)	(R. 1131)	(R. 63)
Mineral rights	5	All	None	\$3, 500	2 \$3, 500	\$300	\$1, 000	\$25	\$50	\$50
Cal-Bay		(R. 799)	(R. 800)	(R. 44)	(R. 799)	(R. 862)	(R. 862)	(R. 1085)	(R. 1131)	(R. 65)
Leaschold	367. 36	208. 83	158. 53	\$461, 000	\$367, 000	\$411, 500	\$358, 000	\$420	\$836	\$836
Cal-Bay				(R. 45)	(R. 291)	(R. 800)		(R. 1090)	(R. 1132)	(R. 65)
Severance				\$150, 000	\$61, 000	\$91, 150		None	None	None
Parcel 59:										
J. Faria		(R. 801)	(R. 801)	(R. 40)	(R. 298)	(R. 801)	(R. 863)	(R. 1086)	(R. 1131)	(R. 64)
Leaschold	73. 51	63. 91	9. 60	\$17, 575	\$23, 625	\$17, 575	\$51, 200	\$320	\$512	\$512
J. Faria				(R. 40)	(R. 296)	(R. 801)		(R. 1090)	(R. 1132)	(R. 64)
Severance				3 \$31, 850	\$3, 750	\$1, 920		None	None	None
M. Faria	(R. 185)			(R. 56)	(R. 188)	(R. 802-3)	(R. 866)	(R. 1085-6)	(R. 1131-2)	(R. 66)
Mineral Rights	440. 87	272. 74	168. 13	\$75, 000	4 \$110, 000	\$75, 235	\$51, 200	\$1, 370	\$2, 312	\$2, 312
M. Faria				(R. 56)		(R. 802-3)		(R. 1090)	(R. 1133)	(R. 66)
Severance				\$35, 875		\$35, 875		None	None	None

See footnotes at end of table.

Tabulation of ownerships, acreages, claims, valuations and awards—Continued

	Acres leased	Leased acres taken	Leased acres not taken	Testimony as to values							
				Claim	Appellants' witnesses			Government's witnesses			
					J. Faria	Wents	Bradford	Armstrong	Paine	Awards	
Parcel 64:											
J. Faria	(R. 237)	(R. 237)		(R. 40)		(R. 801)		(R. 1087)	(R. 1132)	(R. 64)	
Leasehold.....	228.55	.65	227.90	\$175		\$175	None	\$5	\$2.60	\$5	
J. Faria						(R. 802, 834)		(R. 1090)	(R. 1133)	(R. 64)	
Severance.....				(¹)		\$26, 200		None	None	None	
Severance for 310 acres leased by Cal-Bay from Alvernaz but not taken (R. 800, Br. 4)						(R. 800)					
						\$35, 650					

¹ Testimony of Mae E. Roche (R. 198).

² Testimony of Edw. Faria (R. 194).

³ Includes severance for Parcel 64.

⁴ Testimony of Maria Faria (R. 188).

⁵ See footnote 3.

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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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JOSEPH FARIA, JR., EDWARD FARIA,
and MAE E. ROCHE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' REPLY BRIEF.

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UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' REPLY BRIEF.

FOREWORD.

With the exception of the final subdivision herein which combines several subdivisions of the opening brief, the appellants adhere to the subdivision headings of that brief in replying to the arguments of the appellee.

1. THE COMPENSATION AWARDS ARE INADEQUATE AS A MATTER OF LAW AND ARE NOT JUST COMPENSATION.

In answer to this subdivision the appellee invokes the conflict of evidence rule (Bf. Appellee, p. 10), and argues: (A) That "appellants were not entitled to recover their investment in the well" (Bf. Appellee, p.

10); (B) that “the court did not commit error in relation to testimony of value based on speculation” (Bf. Appellee, p. 14); (C) that “under the evidence the jury was not bound to find severance damages” (Bf. Appellee, p. 16); (D) that “appellants were not denied compensation for their reversionary interests” (Bf. Appellee, p. 17); (E) that “the court did not exaggerate appellants’ claim for compensation” (Bf. Appellee, p. 18); and (F) that “under the evidence the jury was not bound to find that appellants’ properties contained gas in commercial quantities” (Bf. Appellee, p. 20).

Appellants are not combating the conflict of evidence rule. Nor are they seeking anything more than the just compensation to which the law entitles them. Separate replies will be made to the above arguments of the appellee.

A. As pointed out in the opening brief at page 6, the well drilled by appellant Cal-Bay Corporation on leased property, reflected an investment by the public of over \$250,000. Only a small part of this investment was recouped by the removal of personal property from the well. It is true that when the appellee took this property it left untaken other property held under lease in the same general district. But to hold those leases, as pointed out at pages 3, 4, and 24 of the opening brief, another well had to be drilled and another investment made of \$250,000 or whatever the cost might be. This factor alone makes it evident that the taking of the well by appellee was a distinct loss by appellants of the cost or value of the well. And the

general rule has said that “It is the owner’s loss, not the taker’s gain, which is the measure of the value of the property taken”. (*United States v. Causby*, 328 U. S. 256, 261, 66 S.Ct. 1062, 1064-1065.) “The owner,” said the Supreme Court in *United States v. Miller*, 317 U.S. 369, 373, 63 S.Ct. 276, 279-280, “is to be put in as good condition pecuniarily as he would have occupied if his property had not been taken”.

The factor mentioned was considered by appellants’ witness Wents in his valuation testimony. (R. 832.) He placed the cost or value of the well at \$234,000. (R. 799, 828.) Bradford, the other valuation witness for appellants, placed the value or cost at \$150,000. (R. 861.) Armstrong and Paine, the valuation witnesses for appellee, said that the well had no value because it was in bad mechanical condition (R. 1088, 1133), but their valuation testimony failed to consider the factor mentioned.

Appellee has therefore missed the mark in arguing that “appellants were not entitled to recover their investment in the well”.

B. Appellee is correct in saying that “appellants do not contend that any evidence offered by them was rejected on the ground that it was speculative”. (Bf. Appellee, p. 15.) Their arguments under the letter “B” (Bf. Appellee, pp. 15-16) have reference to the acts and conduct of the trial judge rather than to the sufficiency of the evidence, and reply thereto will be made in a later part of this brief.

C. At page 17 of its brief the appellee directs the attention of the court to the testimony of Armstrong

and Paine that no severance damage was suffered (R. 1089-1091, 1132-1133), and argues that such testimony warranted a jury finding that no severance damage was suffered. Each said witness gave as the reason for his opinion the fact that remaining areas were of sufficient size to warrant developing. (R. 1089, 1133.) No case supporting the sufficiency of that reason is cited by appellee.

The general rule respecting severance damages is stated in *United States v. Miller*, 317 U.S. 369, 376, 63 S.Ct. 276, 281, 87 L.Ed. 336, as follows:

“Courts have had to adopt working rules in order to do substantial justice in eminent domain proceedings. One of these is that a parcel of land which has been used and treated as an entity shall be so considered in assessing compensation for the taking of a part or all of it. This has begotten subsidiary rules. If only a portion of a single tract is taken the owner’s compensation for that taken includes any element of value arising out of the relation of the part taken to the entire tract.”

Upon an application of this general rule to the present case, the appellants were clearly entitled to severance damages. All properties and property interests taken by the appellee were part of an entity which had been integrated into a general district for oil and gas development. The well on part inured to the benefit of all. It is enough to again point out that the taking of well destroyed the entity and that the drilling of another well was necessary to restore the integration.

D. Here the argument of appellee is that the jury awards were not inadequate so far as compensation for reversionary interests was concerned. (Bf. Appellee, pp. 17-18.) But the record definitely shows the contrary. The awards made were based on the testimony of appellee's valuation experts. Their testimony did not consider the entity factor above discussed. Nor did their testimony consider the factor that the taking of the well might result in the abandonment of the leases and reversion to the lessors of the entire mineral rights. In a later part of this brief reply will be made to appellee's arguments respecting the state of the instructions on the subject. (Bf. Appellee, pp. 17-18.)

E. What appellee says as to exaggeration by the court of appellants' claim for compensation (Bf. Appellee, pp. 18-19) is not pertinent to the question of sufficiency of evidence. It is pertinent only to the question of fair trial. Reply thereto will be made herein when this latter question is under discussion.

F. It appears in the record without conflict that gas in commercial *quality* was encountered during the drilling of the well. Appellee is quite correct, however, that the evidence was in conflict as to whether the "blow-out" in the well at a depth of 4975 feet on November 28, 1944, demonstrated a discovery of gas in commercial *quantity*. (Bf. Appellee, pp. 19-20.) The appellee was responsible for the situation that appellants' testimony on the subject was wholly opinion in character and it may not legitimately complain thereof, for shortly after the well became temporarily

disabled by the "blow-out" the appellee terminated the right of appellant Cal-Bay Corporation to possession of the well. It is obvious, of course, that the state of the evidence on this phase of the case is not at all determinative of appellants' point that the damage awards are inadequate.

2. APPELLANTS WERE DENIED A FAIR TRIAL AND DUE PROCESS OF LAW BY THE ACTS AND CONDUCT OF THE TRIAL JUDGE.

The appellee does not deny the truth of appellants' statement that "the trial judge was an avowed partisan at the trial". (Ap. Op. Bf. p. 28.) The record, of course, permits no other conclusion. (Ap. Op. Bf. p. 28; R. 1140.) And the appellee does not deny the truth of appellants' statement that "the trial judge became an avowed partisan against the appellants because of some personal and uncommunicated knowledge or belief or experience of his own touching oil and gas matters". (Ap. Op. Bf. p. 39.) Again the record permits no other conclusion. (Ap. Op. Bf. pp. 29-39; R. 850-857, 903-908, 926-927.) Nor does the appellee deny the truth of appellants' statement that the trial judge "openly branded appellants' expert witness Bradford a prevaricator and discredited him before the jury". (Ap. Op. Bf. p. 39.) Once more the record permits no other conclusion. (R. 905-908.)

Appellee does deny, however, the truth of appellants' statement that the trial judge "branded appellants' witness Wents a prevaricator and discredited

him before the jury". (Bf. Appellee, p. 22.) Unless a practical and realistic viewpoint is to be discarded, the record is just as plain in its conclusion that witness Wents was impliedly branded as it is that witness Bradford was expressly branded. The express brand was applied to witness Bradford because he said that a purchaser had paid \$3500 a per cent for a lessor's royalty in an unproved piece of land. (Ap. Op. Bf. p. 36.) Under interrogation by the court, witness Wents later said that the value of the lessor's royalty interest of appellant Maria Faria was approximately \$5000 a per cent, and that the witness knew of an instance where as high as \$140,000 a per cent had been paid. (Ap. Op. Bf. p. 38.) Could any juror possibly doubt that if the court put the express brand on witness Bradford because he said \$3500, the same brand was put by implication on witness Wents because he said \$5000 and \$140,000? All this, it is to be remembered, occurred before the court had heard the testimony of appellee's valuation experts Armstrong (R. 1064) and Paine (R. 1127), and at a time when the court was obviously drawing upon some personal and uncommunicated knowledge or belief or experience of his own touching matters properly the subject of expert testimony.

There is an intimation at page 22 of appellee's brief that the court instructed the jury to disregard its comments on witness Bradford. The record shows the contrary. The admonition to the jury was confined to the court's statement, "Well, I do not know what has hap-

pened to our Corporation Department in the State of California. This is all I can say." (R. 907-908.)

The language of the recent California case of *Ettzel v. Rosenbloom*, 83 A.C.A. 954, is so pertinent to the situation here presented, that appellants quote therefrom, commencing at page 957:

"The following rules are applicable to the present situation: (1) Any misconduct on the part of the trial judge from which it may be rightfully deduced that the jury was influenced in rendering its verdict constitutes prejudicial error. (Cases cited.) (2) General Rule: Unless the harmful result of the misconduct of the trial judge cannot be obviated by an appropriate instruction, error cannot be predicated thereon in the absence of (a) an assignment of such misconduct as error and (b) a request to the trial court to instruct the jury to disregard it. (Cases cited.) Exception: In cases where an admonition of the judge to the jury to disregard his misconduct would not remove the prejudicial effect of such misconduct, it is not a prerequisite to urging such error on appeal for the appellant to have objected thereto and made a request that the jury be instructed to disregard it. (Cases cited.) There is *never* an instance which justifies a trial judge or counsel in being discourteous one to the other, to witnesses, parties litigant or jurors. A judge presiding at a trial should conduct it in a fair and impartial manner, and refrain from making unnecessary comments during the course of the trial which may tend toward a prejudicial result to a litigant. (Cases cited.) Applying the foregoing rules to the facts of the instant case it is evident that the trial

judge's remarks were of such a character as to indicate to the jury, first, that defendant Abe Rosenbloom was not telling the truth; second, that defendants' car had struck the plaintiff; and third, that defendants' counsel was trying to keep the facts from being presented to the jury. Therefore, under rule 1, *supra*, such conduct constituted prejudicial error. It is likewise evident that an objection to such misconduct and an admonition by the court to the jury to disregard it would have been ineffectual and would have accentuated the error rather than have removed it. Therefore this case falls under the exception rather than under the general rule set forth above (number 2), and hence it was unnecessary for defendants to have objected to the misconduct of the trial judge and to have requested him to admonish the jury to disregard it."

3. THE TRIAL JUDGE BECAME A PARTISAN AND EXCEEDED THE BOUNDS OF PROPER COMMENT IN THE JURY INSTRUCTIONS.

In the opinion of appellants' witness Byron Norris, a consulting engineer and geologist (R. 621), a commercial discovery of natural gas had been made at the well in Martinez sands or formation on November 28, 1944 (Ap. Op. Br. p. 8; R. 682-683). Comments of the court were not directed at his testimony.

This factor of commercial discovery formed a basis for the opinions on value expressed by appellants' witnesses Wents (R. 810-811) and Bradford (R. 869). In the opinions of appellee's witnesses Armstrong (R.

1097) and Paine (R. 1144) discovery had not been made. According to witness Paine his values would have been higher if discovery had been established as a factor. (R. 1144.) According to witness Armstrong his values would have been higher if penetration of the Martinez sands or formation had been established as a factor. (R. 1113.) Other factors forming a basis for the opinions on value expressed by appellants' witnesses and not considered in the opinions on value expressed by appellee's witnesses have been mentioned in earlier parts of this brief.

With one exception, the values given by witness Paine were greater than those given by witness Armstrong, and in one instance six times greater. In the exception mentioned, the values given by witness Armstrong was about twice that of witness Paine. Some of the values given by witness Wents were five or six times greater than those given by witness Paine; others were very much higher.

In the jury instructions, the trial judge expressed the opinion that the testimony of appellants' witnesses on value, that is, Wents and Bradford, was "extravagant" and "incredible". (Ap. Op. Bf. p. 41.) That, obviously, was but another way of saying that they were prevaricators. This opinion of the trial judge, as already demonstrated, was formed before testimony on value was adduced by the appellee, and was undoubtedly based on matters outside the record or a misconception of law. (Ap. Op. Bf. pp. 39-40.) And this opinion was followed by figures formulated

by the trial judge and submitted for jury consideration whereby the *claims* allegedly made by appellants and totalling \$786,225, were contrasted with the highest values given by appellee's valuation experts in their *testimony* and totalling \$3865. (Ap. Op. Bf. p. 41; R. 1192-1193.) The court also added: "I call your attention to the fact that there is a staggering divergence of opinion between the values testified to by those who have testified on behalf of the defendants and those who have testified on behalf of the Government. The total figures of the defendants' claim is \$786,000. The total figures of values asserted by the Government is \$3,865". (R. 1196.)

The figure \$786,225, stated by the court, reflected the total of the *claims* as they appeared in the pleadings of the defendants. This is conceded by the appellee. (Bf. Appellee, p. 19.) The appellee also concedes that the total of the values testified to by appellants' valuation experts was less than the figure \$786,225. (Bf. Appellee, p. 19.) This court, therefore, cannot be aided by a debate as to whether appellants' tabulation (Ap. Op. Bf. p. 9) or appellee's tabulation (Bf. Resp. App.) is the correct one. What is here apparent, then, is that a misleading figure prejudicial to appellants was submitted to the jury by the trial court.

It is said by the appellee, however, that the total of the *highest values* testified to by appellants' witnesses fairly approximates the figure \$786,225. (Bf. Appellee, p. 19.) But the rudiments of fair play would at least exact the minimal requirement that a court

which tells a jury that values are “extravagant” or “incredible” or “staggering” should not overstate those values or state the highest values when *lower values* have been given. And even if appellee’s tabulation be accepted as correct, it clearly appears therefrom that the total of the *lowest values* set forth does not fairly approximate the figure \$786,225. It is perhaps unnecessary to say that the rudiments of fair play are not to be relaxed simply because the United States was the plaintiff in the action. (*E. C. Shevlin Co. v. United States*, 9 Cir. 1944, 146 F2d 613, 615.)

The case of *Quercia v. United States*, 289 U.S. 466, 53 S.Ct. 698, 77 L.Ed. 1321, cited and quoted at pages 42 to 44 of the opening brief, is decisively to the effect that the trial judge exceeded the bounds of proper comment in the jury instructions. Other cases may be added.

In *United States v. Murdock*, 290 U.S. 389, 394, 54 S.Ct. 223, 225, it was said that “a federal judge may *analyze the evidence*, comment upon it, and express his views with regard to the testimony of witnesses, *but the decision* of issues of the facts must be *fairly* left to the jury”. (Emphasis added.)

In *Starr v. United States*, 153 U.S. 614, 14 S.Ct. 919, 923-924, it was said:

“It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference and may prove controlling. *Hicks v. United States*, 150 U.S. 442, 452, 14 S.Ct. 144.

The circumstances of this case apparently aroused the indignation of the learned judge in an uncommon degree; and that indignation was expressed in terms which were not consistent with due regard to the right and duty of the jury to exercise an independent judgment in the premises, or with the circumspection and caution which should characterize judicial utterance. * * * Whatever special necessity for enforcing the law in all its rigor there may be in a particular quarter of the country, the rules by which, and the manner in which, the administration of justice should be conducted, are the same everywhere; and argumentative matter of this sort should not be thrown into the scales by the judicial officer who holds them."

In *Hunter v. United States*, 5 Cir. 1932, 62 F2d 217, it was said, at page 220:

"The assignments of error based on the district judge's cross-examination of appellant are in our opinion well taken. While that method of cross-examination, if it had been conducted by the district attorney, might have been proper, a district judge ought never to assume the role of a prosecuting attorney and lend the weight of his great influence to the side of the government. It is the judge's duty to maintain an attitude of unswerving impartiality between the government and the accused, and he ought never in any question he asks go beyond the point of seeing to it, in the interests of justice, that the case is fairly tried. We refer with entire approval to what Judge Shelby, speaking for this court long ago, said on this subject in *Adler v. United States*, 182 F.464. The only conclusion that could reasonably be

drawn from the questions objected to was that the judge did not believe appellant was telling the truth about the amount or source of his income, but was thoroughly convinced and was attempting to demonstrate that appellant was deriving a large income from the illegal transportation and sale of liquor. The judge's charge was not as objectionable as was his cross-examination of appellant, but it was erroneous in that it was one sided, and placed undue emphasis on the testimony of appellant which the judge himself had brought out by his questions. If the trial judge comments on the evidence, as he has a right to do, he should call attention to the evidence in favor of as well as that against the accused. * * * That the district judge did not intend to be unfair is beside the question. The case was tried in such a way that the jury, in considering as a whole the judge's questions and charge, might well have reached the conclusion that he was not impartial, but was insisting upon a conviction. It is vastly more important that the attitude of the trial judge should be impartial than that any particular defendant, however guilty, should be convicted. It is too much to expect of human nature that a judge can actively and vigorously aid in the prosecution and at the same time appear to the layman on the jury to be impartial."

In *Musick v. United States*, 6 Cir. 1924, 2 F2d 710, it was said, at page 711:

"Under all the recited circumstances, we are compelled to think this portion of the charge to have the aspect of argument and advocacy beyond the permissible limit. *Wallace v. United States*, 281 F. 972, and cases cited. * * * An objection in

this respect is not necessarily removed by the formal statement that the jury was under no obligation to adopt the judge's opinion; *indeed, that statement may well be put in such a form as to imply disparagement of the jury's intelligence if it does not agree with the judge; the present charge does not lack that atmosphere.*" (Emphasis added.)

And in *Hobart v. United States*, 6 Cir. 1924, 299 F. 784, it was said, at page 785:

"We do not disparage the power—and sometimes the duty—of the federal judge to assist the jury in reaching the right conclusion on the facts. This right, and its properly restrained exercise, strongly tend to make the federal trial court efficient and dependable judicial machines; *but the due restraint of its exercise is as important as the existence of the power.*"

4. THE JURY WAS MISDIRECTED TO THE PREJUDICE OF APPELLANTS.

The specifications of error based on the giving and refusing of instruction and discussed at pages 44 to 48 of the opening brief, are grouped under the above heading in this reply brief. The reply will be short.

It is true that throughout the trial the interests of appellants Maria Faria, Edward Faria, and Mae E. Roche were usually referred to as royalty interests. As a matter of fact, however, the interest of each said appellant was broader than a mere royalty interest, and the use of loose terms during the trial made

it necessary for clarification in the jury instructions. Particularly so, because appellants' witnesses valued these interests on factors not covered by appellee's witnesses in arriving at their values. Appellee's point that the court should have clarified the forms of verdict in this respect, is obviously well taken. (Ap. Op. Bf. p. 44.)

The jury was expressly told that it was "not to consider what the property or interest taken was worth to the defendants or any of them or to the owners of the leasehold or to the owners of the royalty interest for speculation". (R. 1183.) This was contrary to the law. (*Montana Ry. Co. v. United States*, 137 U.S. 330, 11 S.Ct. 96, 34 L.Ed. 681; *Eagle Lake Improvement Co. v. United States*, 5 Cir., 141 F2d 562, 564.) Manifestly, the refusal of appellants' instruction based on said cases was prejudicial error. (Ap. Op. Bf. p. 45.)

Appellants' requested instruction No. 44 was patterned on a similar instruction given in *United States v. Block*, 9 Cir. 1947, 160 F2d 604, and appearing at pages 481 and 482 of the record in that case (No. 11282). That the circumstances of this case demanded the giving of the requested instruction, is not susceptible to doubt. (Ap. Op. Bf. pp. 45-47.) For a similar reason, the same must be said of the refusal to give the instruction discussed at pages 47 and 48 of the opening brief.

CONCLUSION.

Appellants again respectfully submit that a miscarriage of justice occurred in the trial court, that the trial court abused its discretion in denying a new trial, and that the judgment appealed from should be reversed as to each appellant.

Dated, San Francisco,
April 5, 1948.

A. J. SCAMPINI,
WALTER E. HETTMAN,
HERBERT CHAMBERLIN,
Attorneys for Appellants.



No. 11699

United States
Circuit Court of Appeals
For the Ninth Circuit

C. A. VAN DUSEN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the Tax Court
of the United States

FILED

1931 JUN 19

PAUL P. O'BRIEN,
CLERK



No. 11699

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Appearances :

RAYMOND M. WANSLEY,

JOHN M. CRANSTON,

JAMES L. CHAPMAN,

For Taxpayer.

E. A. TONJES

R. C. WHITLEY

For Commissioner.

The Tax Court of the United States

Docket No. 5211

C. A. VAN DUSEN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1944

June 5—Petition received and filed. Taxpayer notified. Fee paid.

June 5—Copy of petition served on General Counsel.

July 20—Answer filed by General Counsel.

July 20—Request for hearing in Los Angeles filed by General Counsel.

July 25—Notice issued placing proceeding on Los Angeles, Cal. calendar. Service of answer and request made.

Aug. 7—Reply to answer filed by taxpayer. Copy served 8/8/44.

1945

Dec. 14—Hearing set Feb. 4, 1946, Los Angeles, California.

1946

Feb. 4-7—Hearing had before Judge Van Fossan on merits. Motion of respondent to amend answer denied. Motion of respondent to continue denied. Submitted. Deposition admitted. Stipulation of facts and stipulation as to taking deposition filed. Briefs due 3/24/46. Replies due 4/8/46.

Feb. 23—Transcript of hearing 2/4/46 filed.

Feb. 23—Transcript of hearing 2/7/46 filed.

Mar. 21—Brief filed by General Counsel.

Mar. 21—Brief filed by taxpayer. Copies received 3/25/46. Served 3/25/46.

Apr. 8—Reply brief filed by taxpayer. 4/9/46 served.

June 17—Notice of appearance of John M. Cranstons as counsel filed.

1947

Feb. 24—Findings of fact and opinion rendered, Judge Van Fossan. Decision will be entered under Rule 50. 2/25/46 copy served.

Mar. 28—Respondent's computation for entry of decision filed.

Mar. 31—Hearing set Apr. 30, 1947 on Rule 50, Washington, D. C.

Apr. 30—Hearing had before Judge Van Fossan on settlement under Rule 50. Decisions to be entered in accordance with respondent's computation.

May 1—Decision entered, Judge Murdock, Div. 3.

1947

June 20—Petition for review by U. S. Circuit Court of Appeals for the 9th Circuit, filed by taxpayer.

July 2—Proof of service filed.

July 7—Affidavit of service filed (2) of petition for review.

July 14—Statement of points to be relied upon with affidavit of service by mail filed by taxpayer.

July 14—Designation of portions of record, proceedings and evidence to be contained in record on review with affidavit of service by mail filed by taxpayer. [1*]

The Tax Court of the United States
Washington, D. C.

Docket No. 5211

C. A. VAN DUSEN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the

* Page numbering appearing at top of page of original certified Transcript of Record.

Commissioner of Internal Revenue in his notice of deficiency (Symbols LA:IT:90D:PB) dated March 10, 1944, and as a basis of this proceeding alleges as follows:

1. The petitioner is an individual with principal residence at 2668 Poinsettia Drive, San Diego, California. The return periods here involved were filed with the Collector for the Sixth District of California.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on March 10, 1944.

3. The taxes in controversy are income taxes for the calendar year 1938 and in the amount of three hundred ten and 66/100 dollars (\$310.66), for the calendar year 1939 and in the [2] amount of five hundred twenty eight and 22/100 dollars (\$528.22), for the calendar year 1940 and in the amount of one thousand two hundred fifty one and 02/100 dollars (\$1,251.02) and for the calendar year 1941 and in the amount of four thousand eight hundred sixty three and 30/100 dollars (\$4,863.30).

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) The Commissioner erred in that the assessment and collection of the deficiencies determined for the calendar years 1938 and 1939 are barred by the provisions of Section 275(a) of the Internal Revenue Code and are not permitted by Section 275 (c) of the Internal Revenue Code.

(b) The Commissioner erred in including in gross income of the petitioner amounts, alleged to represent petitioner's community half of income within the meaning of Section 22(a) of the Internal Revenue Code received for services of petitioner as a result of the purchase of Consolidated Aircraft Corporation stock from R. H. Fleet by petitioner at less than its fair market value, as follows:

For the Calendar Year 1938—\$3,826.88

For the Calendar Year 1939—\$5,367.19

For the Calendar Year 1940—\$3,937.50

For the Calendar Year 1941—\$7,500.00

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) The petitioner filed his return for the calendar year 1938 on or before March 15, 1939. His return for the calendar year 1939 was filed on or before March 15, 1940.

(b) The petitioner did not omit from the gross income stated in his returns for the calendar years 1938 and 1939 amounts properly includible therein which are in excess of 25 per centum of the amounts of gross income stated in said returns.

(c) The petitioner was employed on December 10, 1934 by Consolidated Aircraft Corporation as Works Manager at a salary of \$7,500.00 per annum. This salary was in excess of any salary that had previously been paid by said Corporation to Employees holding said position.

(d) R. H. Fleet was President of Consolidated Aircraft Corporation and was its majority stockholder from December 10, 1934 to December 31, 1941.

(e) On December 10, 1934, R. H. Fleet wrote a letter to petitioner offering to sell, at a price of \$5.00 per share, 50 shares of said R. H. Fleet's personally owned common stock of Consolidated Aircraft Corporation to petitioners each month, so long as petitioner was retained in said company's employ. Under the terms of said offer, petitioner was not obligated to purchase said stock. Said R. H. Fleet received no consideration from petitioner for said offer.

(f) The price at which said R. H. Fleet offered to sell said stock to petitioner was a fair and reasonable price in view of the prices at which said stock had sold during 1933 and 1934 and in view of general business conditions at December 10, 1934. [4]

(g) Petitioner purchased common stock of said Consolidated Aircraft Corporation from said R. H. Fleet under the terms of said offer as follows:

Market Value			
Years	Shares	When Purchased	Cost
1938	600	\$10,653.75	\$3,000.00
1939	750	14,484.38	3,750.00
1940	400	9,875.00	2,000.00
1941	600	18,000.00	3,000.00

(h) The sale of said stock at \$5.00 per share allowed said R. H. Fleet to dispose of said stock at a

substantial profit and in a manner which did not disturb the market price thereof on the stock exchange.

(i) No contract of employment or employer-employee relationship existed between petitioner and said R. H. Fleet at any time from December 10, 1934 to December 31, 1941, or at any other time. Petitioner performed no services for said R. H. Fleet and received no compensation of any kind or in any guise from him at any time. At all times from December 10, 1934 to December 31, 1941, petitioner was the employee of said Consolidated Aircraft Corporation, and of no one else.

(j) Said R. H. Fleet took no deduction from gross income, as an ordinary and necessary expense, of the difference between the fair market value of said stock and the sale price of said stock to petitioner upon his income tax returns for the taxable years, 1938, 1939, 1940 or 1941. [5]

Wherefore, the petitioner prays that this court may hear the proceeding and redetermine the petitioner's liability for income taxes for the calendar years 1938, 1939, 1940 and 1941.

/s/ RAYMOND M. WANSLEY
Certified Public Accountant,
Counsel for Petitioner. [6]

State of California,
County of San Diego—ss.

C. A. Van Dusen, being duly sworn, says that he is the petitioner above named;

That he has read the foregoing petition, or had

the same read to him, and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those he believes to be true.

/s/ C. A. VAN DUSEN

Subscribed and sworn to before me this 31st day of May, 1944.

[Seal] /s/ R. N. CHAMBERLIN

Notary Public in and for the State and County aforesaid.

My commission expires Nov. 25, 1945.

EXHIBIT A

Treasury Department, Internal Revenue Service,
417 South Hill Street, Los Angeles 13, California,
March 10, 1944.

LA:IT:

90D:PB

Mr. C. A. Van Dusen,
2668 Poinsettia Drive
San Diego, California

Dear Mr. Van Dusen:

You are advised that the determination of your income tax liability for the taxable years ended December 31, 1938 to 1941, inclusive, discloses a deficiency of \$6,953.20, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the Tax Court of the United States, at its principal address, Washington, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA:Conf. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

JOSEPH D. NUNAN, Jr.,
Commissioner,

By GEORGE D. MARTIN,
Internal Revenue Agent
in Charge.

Enclosures:

Statement

Form of waiver. [8]

Statement

Tax Liability for the Taxable Years Ended

December 31, 1938 to 1941, inclusive

Income Tax

Year	Liability	Assessed	Deficiency
1938.....	\$ 424.09	\$ 113.43	\$ 310.66
1939.....	748.96	220.74	528.22
1940.....	3,431.04	2,180.02	1,251.02
1941.....	27,245.90	22,382.60	4,863.30
<hr/>			
Total	\$31,849.99	\$24,896.79	\$6,953.20

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated January 19, 1944.

Adjustments to Net Income

Taxable Year Ended December 31, 1938

Net income as disclosed by return.....	\$3,400.39
Additional income and unallowable deductions:	
(a) Compensation for services.....	\$4,576.88
(b) Dividends received.....	300.00
(c) Rental loss disallowed.....	440.73
(d) Short-term capital loss disallowed..	147.27
(e) "Other deductions" disallowed.....	90.00
<hr/>	
Net income adjusted.....	\$8,955.27

Explanation of Adjustments

(a) This represents your community half of income within the meaning of section 22(a) of the

Revenue Act of 1938, received as compensation for services, as follows:

1. Received from Aero Industries Technical Institute, Inc. (this income was reported in an amended return)	\$750.00
2. Received as a result of the purchase of Consolidated Aircraft Corporation stock from Mr. R. H. Fleet at less than its fair market value (this amount of income omitted from your return is in excess of 25 per centum of the amount of gross income stated in your return).....	3,826.88
Total	<hr/> \$4,576.88

(b) Dividends received from Consolidated Aircraft Corporation amounted to \$4,844.00, of which your community half is \$2,422.00. Since you reported \$2,122.00 dividends received from this corporation, the amount of \$300.00 is added to income.

(c) The loss from rental property at Baltimore is disallowed to the extent of \$440.73 as to your half interest due to an excessive deduction for depreciation.

(d) The deduction of \$147.27 for your community half of loss from final disposition of Counter Thrust Square Shear venture is disallowed as being a short-term capital loss, not deductible since no short-term capital gain was reported.

(e) Your community half of the deduction of \$180.00 for two months rental of personal residence while absent on business is disallowed as representing a personal expense.

Computation of Tax
Taxable Year Ended December 31, 1938

Net Income Adjusted.....		\$8,955.27
Less: Personal exemption.....	\$1,050.00	
Credit for dependents	400.00	1,450.00
		<hr/>
Balance (surtax net income).....		\$7,505.27
Less: Earned income credit (10% of \$7,846.37) ..		784.64
		<hr/>
Net income subject to normal tax.....		\$6,720.63
Normal tax at 4% on.....	\$6,720.63	\$268.83
Surtax on	7,505.27	155.26
		<hr/>
Total income tax.....		\$ 424.09
Correct income tax liability.....		\$ 424.09
Income tax assessed:		
Original, account No. 844466.....	\$ 64.94	
Amended, account No. 200507,		
Feb., 1940	27.00	
Deficiency, account No. 510553,		
Aug. 23, 1940.....	21.49	
		<hr/>
Total income tax assessed.....		\$ 113.43
		<hr/>
Deficiency of income tax.....		\$ 310.66

Adjustments to Net Income
Taxable Year Ended December 31, 1939

Net income as disclosed by return.....	\$6,536.06
Additional income and unallowable deductions:	
(a) Compensation for services.....	\$5,367.19
(b) Depreciation disallowed	440.73
	<hr/>
Net income adjusted.....	\$12,343.98

Explanation of Adjustments

(a) This represents your community half of in-

come within the meaning of section 22(a) of the Internal Revenue Code, received as compensation for services as a result of the purchase of Consolidated Aircraft Corporation stock from Mr. R. H. Fleet at less than its fair market value.

This amount of income omitted from your return is in excess of 25 per centum of the amount of gross income stated in your return.

(b) The loss from rental property at Baltimore is disallowed to the extent of \$440.73 as to your half interest due to an excessive deduction for depreciation.

Computation of Tax

Taxable Year Ended December 31, 1939

Net Income Adjusted.....		\$12,343.98
Less: Personal exemption.....	\$1,050.00	
Credit for dependents	400.00	1,450.00
		<hr/>
Balance (surtax net income).....		\$10,893.98
Less: Earned income credit.....		1,234.40
		<hr/>
Net income subject to normal tax.....		\$ 9,659.58
Normal tax at 4% on.....	\$ 9,659.58	\$386.38
Surtax on	10,893.98	362.58
		<hr/>
Total income tax.....		\$ 748.96
Correct income tax liability.....		\$ 748.96
Income tax assessed: Original, account No. 265861		220.74
		<hr/>
Deficiency of income tax		\$ 528.22

Adjustments to Net Income
Taxable Year Ended December 31, 1940

Net income as disclosed by return.....	\$18,503.10
Additional income and unallowable deductions:	
(a) Compensation for services	\$3,937.50
(b) Dividends received.....	87.00
(c) Depreciation disallowed	440.73
	<hr/>
Net income adjusted	\$22,968.33

Explanation of Adjustments

(a) This represents your community half of income within the meaning of section 22(a) of the Internal Revenue Code, received as compensation for services as a result of the purchase of Consolidated Aircraft Corporation stock from Mr. R. H. Fleet at less than its fair market value.

(b) The amount of \$87.00 is added to dividends received, since you reported your community half of dividends as \$7,735.00 whereas the correct amount is \$7,822.00, as follows:

Consolidated Aircraft Corporation....	\$12,944.00
Aero Industries Technical Institute, Inc.	2,700.00
Total	\$15,644.00
Your community half.....	\$ 7,822.00

(c) The loss from rental property at Baltimore is disallowed to the extent of \$440.73 as to your half interest due to an excessive deduction for depreciation.

Computation of Tax
Taxable Year Ended December 31, 1940

Net Income Adjusted.....		\$22,968.33
Less: Personal exemption.....	\$800.00	
Credit for dependents.....	400.00	1,200.00
		<hr/>
Balance (surtax net income).....		\$21,768.33
Less: Earned income credit.....		1,400.00
		<hr/>
Net income subject to normal tax.....		\$20,368.33
Normal tax at 4% on.....	\$20,368.33	\$ 814.73
Surtax on.....	21,768.33	2,304.40
		<hr/>
Total normal tax and surtax.....		\$ 3,119.13
Defense tax (10% of \$3,119.13).....		311.91
		<hr/>
Total income tax.....		\$ 3,431.04
Correct income tax liability		\$ 3,431.04
Income tax assessed: Original, account No. 202467		2,180.02
		<hr/>
Deficiency of income tax.....		\$ 1,251.02

Adjustments to Net Income
Taxable Year Ended December 31, 1941

Net income as disclosed by return.....		\$57,962.05
Additional income and unallowable deductions:		
(a) Compensation for services.....	\$7,500.00	
(b) Depreciation disallowed.....	440.73	
(c) Net long-term capital gain.....	200.00	8,140.73
		<hr/>
Net income adjusted.....		\$66,102.78

Explanation of Adjustments

(a) This represents your community half of income within the meaning of section 22(a) of the Internal Revenue Code, received as compensation

for services as a result of the purchase of Consolidated Aircraft Corporation stock from Mr. R. H. Fleet at less than its fair market value.

(b) The loss from rental property at Baltimore is disallowed to the extent of \$440.73 as to your half interest due to an excessive deduction for depreciation.

(c) The sale price of 400 shares of Consolidated Aircraft Corporation stock sold on December 22, 1941 is understated \$400.00 as to your community half, resulting in an understatement of your long-term capital gain in the amount of \$200.00.

Computation of Alternative Tax

Taxable Year Ended December 31, 1941

Net income adjusted.....		\$66,102.78
Minus: Net long-term capital gain.....		10,713.85
		<hr/>
Ordinary net income.....		\$55,388.93
Less: Personal exemption.....	\$550.00	
Credit for dependents.....	400.00	950.00
		<hr/>
Balance (surtax net income)		\$54,438.93
Less: Earned income credit		1,400.00
		<hr/>
Net income subject to normal tax		\$53,038.93
Normal tax at 4% on.....	\$53,038.93	\$ 2,121.56
Surtax on.....	54,438.93	21,910.18
		<hr/>
Partial tax		\$24,031.74
Plus: 30% of net long-term capital gain.....		3,214.16
		<hr/>
Alternative tax		\$27,245.90

Computation of Tax
Taxable Year Ended December 31, 1941

Net income Adjusted.....		\$66,102.78
Less: Personal exemption	\$550.00	
Credit for dependents	400.00	950.00
		<hr/>
Balance (surtax net income)		\$65,152.78
Less: Earned income credit		1,400.00
		<hr/>
Net income subject to normal tax		\$63,752.78
Normal tax at 4% on.....	\$63,752.78	\$ 2,550.11
Surtax on.....	65,152.78	28,120.14
		<hr/>
Total		\$30,670.25
Alternative tax		\$27,245.90
Total income tax.....		\$27,245.90
Correct income tax liability		\$27,245.90
Income tax assessed: Original, account No. 948486		22,382.60
		<hr/>
Deficiency of income tax.....		\$ 4,863.30

[Endorsed]: Filed June 5, 1944.

[Title of Tax Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits, denies and alleges as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Admits that the taxes in controversy are income taxes for the calendar years 1938, 1939, 1940

and 1941; denies the remainder of the allegations contained in paragraph 3 of the petition.

4. Denies the allegations of error contained in subparagraphs (a) and (b) of paragraph 4 of the petition. [15]

5. (a) Denies that the petitioner filed his income tax return for the calendar year 1938 on or before March 15, 1939, and alleges that the said return was filed on March 23, 1939. Admits that the petitioner's income tax return for the calendar year 1939 was filed on March 15, 1940; denies the remaining allegations contained in subparagraph (a) of paragraph 5 of the petition.

(b) Denies the allegations contained in subparagraph (b) of paragraph 5 of the petition.

(c) Admits that the petitioner was employed on December 10, 1934, by Consolidated Aircraft Corporation. Denies the remainder of the allegations contained in subparagraph (c) of paragraph 5 of the petition.

(d) to (f), inclusive. Denies the allegations contained in subparagraphs (d) to (f), inclusive, of paragraph 5 of the petition.

(g) Admits that the petitioner purchased common stock of Consolidated Aircraft Corporation from R. H. Fleet during the years 1938, 1939, 1940 and 1941, in the number of shares and at the cost set forth in subparagraph (g) of paragraph 5 of the petition. Respondent further admits that the stock purchased by the petitioner during the said

years had a market value when purchased as set forth in subparagraph (g) of paragraph 5 of the petition. [16] Denies the remainder of the allegations contained in subparagraph (g) of paragraph 5 of the petition.

(h) to (j), inclusive. Denies the allegations contained in subparagraphs (h) to (j), inclusive, of paragraph 5 of the petition.

6. Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Further answering, respondent alleges:

7. That the petitioner realized taxable income during the year 1938, as compensation for services, which was not reported in his income tax return for the year 1938, in the amount of \$4,576.88. The said amount is determined as follows:

Received from Aero Industries	
Technical Institute, Inc.....	\$1,500.00
Received as a result of the acquisition	
of Consolidated Aircraft Corpora-	
tion stock	7,653.75
	<hr/>
Total	\$9,153.75
Petitioner's community one-half.....	\$4,576.88

8. That the said sum of \$4,576.88 constitutes gross income of the petitioner and is in excess of 25 per centum of the amount of gross income stated in the return of the petitioner for the year 1938.

9. That the petitioner realized taxable income during the year 1939, as compensation for services, which was not reported in his income tax return for the year 1939, in the amount of [17] \$5,367.19. The said amount is determined as follows:

Received as a result of the acquisition of Consolidated Aircraft Corpora- tion stock	\$10,734.38
Petitioner's community one-half.....	5,367.19

10. That the said sum of \$5,367.19 constitutes gross income of the petitioner and is in excess of 25 per centum of the amount of gross income stated in the return of the petitioner for the year 1939.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ J. P. WENCHEL, ECC
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:

B. H. Neblett,
Division Counsel.

Earl C. Crouter,
E. A. Tonjes,
Special Attorneys,
Bureau of Internal Revenue.

EAT/vc/ 7/12/44

[Endorsed]: Received and filed July 20, 1944.

[Title of Tax Court and Cause.]

REPLY

The petitioner by his counsel, Raymond M. Wansley, for reply to the answer of the Commissioner of Internal Revenue, admits, denies and alleges as follows:

7. Denies the allegations contained in paragraph 7 of the Commissioner's answer.

8. Denies the allegations contained in paragraph 8 of the Commissioner's answer.

9. Denies the allegations contained in paragraph 9 of the Commissioner's answer.

10. Denies the allegations contained in paragraph 10 of the Commissioner's answer.

11. Denies each and every allegation contained in Commissioner's answer not hereinbefore specifically admitted or denied.

Wherefore, the petitioner prays that this Court may hear the proceeding and redetermine the petitioner's liability [19] for income taxes for the calendar years 1938, 1939, 1940 and 1941.

Respectfully submitted,

/s/ RAYMOND M. WANSLEY,
Counsel for Petitioner.

[Endorsed]: Received and filed Aug. 7, 1944.

The Tax Court of the United States
Washington, D. C.

Docket No. 5210

WANDA V. VAN DUSEN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Docket No. 5211

C. A. VAN DUSEN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STIPULATION OF FACTS

It is hereby stipulated by and between Wanda V. Van Dusen and C. A. Van Dusen, Petitioners, and the Commissioner of Internal Revenue, Respondent, by their respective attorneys, that the following facts shall be taken as true, provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not at variance with the facts herein stipulated:

1. C. A. Van Dusen and Wanda V. Van Dusen were husband and [21] wife, and were residents of

the State of California throughout each of the years 1938, 1939, 1940 and 1941.

2. On December 10, 1934, C. A. Van Dusen entered the employ of Consolidated Aircraft Corporation as Factory Manager at a salary of \$9000 per annum, pursuant to an oral agreement entered into on December 7, 1934.

3. C. A. Van Dusen received salary from Consolidated Aircraft Corporation as follows:

Year	Salary
1938	\$15,205.04*
1939	16,020.08
1940	22,442.50
1941	31,255.00

*\$8600.01 of his salary for 1938 was exempt from taxation because received for foreign service.

4. C. A. Van Dusen and Wanda V. Van Dusen filed separate Income Tax Returns for the calendar years 1938, 1939, 1940 and 1941. Attached hereto are the said returns filed by the said individuals for the said years marked Exhibits A to H.

5. On December 7, 1934, R. H. Fleet gave to C. A. Van Dusen an oral option for the purchase of stock of Consolidated Aircraft Corporation, which option was reduced to writing on December 10, 1934, and was terminated by written agreement on December 31, 1941, said written option and termination being in the following words and figures:

Consolidated Aircraft Corporation
Buffalo, New York

R. H. Fleet
President

December 10, 1934

Mr. Charles A. Van Dusen (Confidential)

Dear Van:

In connection with your employment this day by our company, it gives me much pleasure to confirm my offer to sell you fifty (50) shares of my personal common stock in this corporation at the price of \$5 net per share each and every month for the next ten years (unless I die or cease to be an employee of Consolidated, in which event this is modified against me or my estate to five years from this date), this right to hold, however, only so long as you are retained in the company's employ.

You are under no obligation to purchase or to hold after purchase, any such stock under this offer; failing to purchase any month you forfeit nothing but the right to buy that month's quota of 50 shares.

So that you may get prompt delivery of any shares you purchase hereunder, I will leave sufficient of my shares, in street names, properly endorsed, with the Treasurer of the company to fulfill this agreement.

Until I further advise, would prefer that if

you sell you do so only to or thru our brokers,
Hammons & Company, 120 Broadway, New
York City (phone Rector 2-4400).

Cordially,

/s/ R. H. FLEET.

RHF-B

It is mutually agreed that the foregoing
agreement is to terminate on December 31, 1941.

Dated: San Diego, Cal., December 15, 1941.

/s/ R H. FLEET.

/s/ CHARLES A. VAN DUSEN.

6. On December 7, 1934, the common stock of Consolidated Aircraft Corporation sold on the New York Curb Exchange for a high of $9\frac{1}{2}$, and a low of $8\frac{7}{8}$.

7. The price ranges of the common stock of Consolidated Aircraft Corporation on the New York Curb Exchange for the years 1932, 1933, and 1934 were as follows:

1932	High	$4\frac{3}{4}$	Low	1
1933	High	12	Low	1
1934	High	$12\frac{7}{8}$	Low	$6\frac{3}{8}$

8. The common stock of Consolidated Aircraft Corporation had a par value of one dollar per share, and a book value of \$3.55 per share at December 7, 1934.

9. There were 574,400 shares of the common

stock of Consolidated Aircraft Corporation outstanding on December 7, 1934, and R. H. Fleet owned 261,481 shares of the common stock of Consolidated Aircraft Corporation on that date.

10. The total number of shares of common and preferred stock outstanding on January 1, 1938, and December 31, 1938, December 1, 1939, December 1, 1940, and December 31, 1941, and the highest number of said shares owned by R. H. Fleet during the years 1938, 1939, 1940 and 1941, were as follows:

Capital Stock

Outstanding	Preferred	Common
January 1, 1938	23,708 shares	574,760
December 31, 1938	23,820	574,760
December 31, 1939	23,820	576,160
December 31, 1940	23,820	578,605
December 31, 1941	None	1,284,244

During the year 1941 514 shares of preferred stock were retired at \$55 per share and 23,306 shares were converted into common at rate of two shares common for each share of preferred. [24]

The stock owned by R. H. Fleet was as follows:

	Preferred	Common
1938	6,000	164,841
1939	6,010	164,241
1940	6,010	162,791
1941	6,010	348,822

11. C. A. Van Dusen purchased common stock of Consolidated Aircraft Corporation from R. H. Fleet, under the terms of the agreement set forth in paragraph 5 above, as follows:

Years	Shares	Market Value	
		When Purchased	Cost
1938	600	\$10,653.75	\$3,000.00
1939	750	14,484.38	3,750.00
1940	400	9,875.00	2,000.00
1941	600	18,000.00	3,000.00

12. At all times from December 7, 1934, to December 31, 1941, C. A. Van Dusen was the employee of said Consolidated Aircraft Corporation.

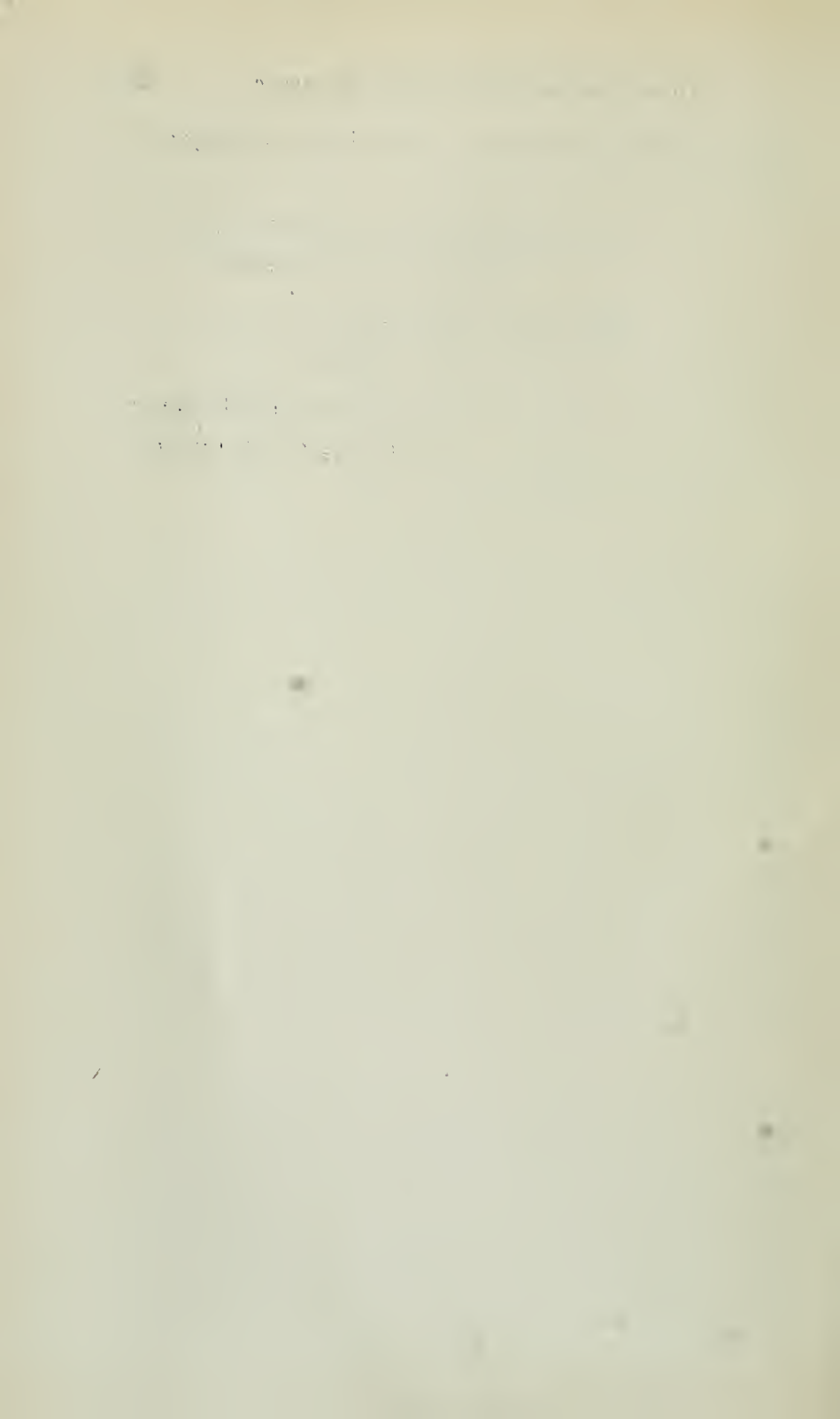
13. R. H. Fleet claimed no deductions from gross income in his returns for the calendar years 1938, 1939, 1940 and 1941 for the difference between the fair market value of the common stock of Consolidated Aircraft Corporation and the sale price of said common stock to said C. A. Van Dusen, but reported as income in his returns for said years the difference between the basis of said stock to R. H. Fleet and the sum of \$5 per share received upon said sales to C. A. Van Dusen.

14. Consolidated Aircraft Corporation claimed upon its returns as deductions from gross income for the years 1938, 1939, 1940 and 1941 only the salary paid by it to C. A. Van Dusen for those years as set forth in paragraph 4 above and did not claim any deduction [26] with regard to the sales of its

stock to R. H. Fleet to C. A. Van Dusen during said years.

/s/ RAYMOND M. WANSLEY,
Counsel for Petitioner.

/s/ J. P. WENCHEL, ECC
Chief Counsel,
Bureau of Internal Revenue,
Counsel for Respondent.



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Treasury Department

FIELD

FORM 1940

UNITED STATES

Internal Revenue Service

Page 1

1938 INDIVIDUAL INCOME TAX RETURN 1938

(Auditor's Stamp)

FOR NET INCOMES OF MORE THAN \$5,000 FROM SALARIES, WAGES,
DIVIDENDS, INTEREST, ANNUITIES, AND FOR INCOMES FROM
OTHER SOURCES REGARDLESS OF AMOUNTS

For Calendar Year 1938

or fiscal year beginning _____, 1938, and ended _____, 1939

(Before Preparing This Return, Read the Instructions Carefully)

To be filed with the Collector of Internal Revenue for your district not later than the 15th day of the third month following the close of your taxable year

PRINT NAME AND ADDRESS PLAINLY (See Instruction E)

C. A. Van Dusen

(Name) (Use joint names of both husband and wife, if a joint return)

3738 Amaryllis Drive

(Street and number, or rural route)

San Diego

San Diego California

(Post office)

(County)

(State)

(Do not use these spaces)

File

Code

Serial

No.

Dist.

6-Calif

RECEIVED

Wanda V. Van Dusen

MAR 23 1939

COLL. INT. REV.

LOS ANGELES, CAL.

Cash—Check—M.O.

First Payment

65.27

Item and
Description No.

1. Salaries and other compensation for personal services. (From Schedule C)
2. Dividends
3. Interest on bank deposits, notes, mortgages, etc.
4. Interest on corporation bonds
5. Taxable interest on Government obligations, etc. (From Schedule C)
6. Income (or loss) from partnerships, syndicates, pools, etc. (other than S-corporation gains or losses). (Partners names and addresses)

7. Income from fiduciaries. (Partners names and addresses)

8. Rents and royalties. (From Schedule C)

9. Income (or loss) from business or profession. (From Schedule D)

10. (a) Net short-term gain from sale or exchange of capital assets. (From Schedule E)

- (b) Net long-term gain (or loss) from sale or exchange of capital assets. (From Schedule E)

- (c) Net gain (or loss) from sale or exchange of property other than capital assets. (From Schedule E)

11. Other income (including income from annuities). (State nature; use separate schedule if necessary)

12. Total income in items 1 to 11. (Enter net taxable income in Schedule I)

DEDUCTIONS 1/2 of total income to wife

Wanda V. Van Dusen

13. Contributions paid. (Explain in Schedule H)

14. Interest. (Explain in Schedule H)

15. Taxes. (Explain in Schedule H)

16. Losses from fire, storm, shipwreck, or other casualty, or theft. (Explain in Schedule H)

17. Bad debts. (Explain in Schedule H)

18. Other deductions authorized by law. (Explain in Schedule H)

19. Total deductions in items 13 to 18

20. Net income (item 12 minus item 19)

Net income to wife, Wanda V. Van Dusen

COMPUTATION OF TAX

21. Net income (item 20 above) \$ 3,400 39

22. Less: Personal exemption. \$ 1,050 00

23. Credit for dependents. \$ 400 00

24. Balance (surplus net income) \$ 1,950 39

25. Less: Income tax on Corporation dividends, etc. (See Instructions 23) \$

26. Earned income credit. \$ 326 95

27. Balance subject to normal tax \$ 1,623 44

28. Normal tax (4% of item 27) \$ 64 94

29. Surplus on item 24. (See Instructions 27) \$

30. Total (item 28 plus item 29) \$ 64 94

31. Total tax (item 30, or if you had a net long-term capital gain or loss, enter line 16, Schedule F) \$ 64 94

32. Less: Income tax paid at source \$ 23 23

33. Amounts that paid to a foreign country or U.S. possession. (Attach Form 114) \$

34. Balance of tax (item 31 minus items 32 and 33) \$ 64 94

NOTE—One form marked "DUPLICATE COPY" must be filed with this original return (It will be assessed if duplicate copy is not filed)

EX. A.

Int. 7-1774

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Schedule A.—INCOME RECEIVED FROM OTHERS CONSISTING OF SALARIES, WAGES, FEES, AND OTHER COMPENSATION FOR PERSONAL SERVICES. (See instruction 1)

1. Name and address of employer and nature of income	2. Amount	3. Expenses (deductions)	4. Amount
Consolidated Aircraft Corporation Lindbergh Field, San Diego, Calif.		Less: Salary earned while employed outside of United States from 1/15/38 to 8/15/38 (7 mos.)	8,600 01
GROSS SALARY	15,205 04	Less: 1% California unemployment insurance tax on \$8,605.08	66 05
Total of column 2 minus total of column 4 (enter as item 1, page 1)			6,538 98

Schedule B.—INTEREST ON GOVERNMENT OBLIGATIONS, ETC. (See instruction 3)

1. Obligations or securities	2. Amount owned at end of year including your proportionate share of such obligations held by estates, trusts, partnerships, or common trust funds	3. Interest received or accrued during the year	4. Interest exempt from taxation	5. Interest on amount in excess of exemption
(a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions	\$	\$	All	00
(b) Obligations issued under Federal Farm Loan Act, or under such Act as amended			All	00
(c) Obligations of United States issued on or before September 1, 1917			All	00
(d) Treasury Notes, Treasury Bills, and Treasury Certificates of Indebtedness			All	00
(e) United States Savings Bonds and Treasury Bonds			\$	\$
(f) Obligations of instrumentalities of the United States (other than obligations to be reported in (b) above)			None	
(g) Total (enter on line 3, page 1)				\$

Schedule C.—INCOME FROM RENTS AND ROYALTIES. (See instruction 5)

1. Kind of property	2. Amount	3. Depreciation (applied in Schedule D)	4. Repairs (explain below)	5. Other expenses (explain below)	6. Net profit (subtract 3, 4, and 5 from 2; enter on line 6, page 3)
Royalties from Counter Thrust Square Shear	\$ 601 33	\$ -	\$ -	\$ -	\$ 601 33
Dwelling house at 107 Upror Road, Baltimore, Md.	-	1,425 00	(2) 75 00	(1) 26 50	1,626 50
Total					925 17

Explanation of deductions claimed in columns 4 and 5: (1) Roland Park maintenance tax (2) Repairs - relating

Schedule D.—PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION. (See instruction 9)

1. Total receipts (state nature of business or profession)	2. Final disposition of Counter Thrust Square Shear venture	3. Total deductions	4. Net profit (or loss)
COST OF GOODS SOLD		OTHER BUSINESS DEDUCTIONS	
2. Labor	\$ 156 20	10. Salaries not included as "Labor" (do not deduct compensation for yourself)	\$
3. Material and supplies	39 85	11. Interest on business indebtedness	
4. Merchandise bought for sale		12. Taxes on business and business property	
5. Other costs (explain below)	121 01	13. Losses (explain below)	
6. Plus inventory at beginning of year	1,301 47	14. Bad debts arising from sales or services	
Total (lines 2 to 6)	\$ 1,618 53	15. Depreciation, obsolescence, and depletion (explain in Schedule E)	
7. Less inventory at end of year		16. Rent, repairs, and other expenses (explain below or on separate sheet)	
8. Net cost of goods sold (line 7 minus line 6)	\$ 1,618 53	17. Total (line 10 to 16)	\$
Enter "C," "M," or "N" on lines 8 and 9 to indicate whether inventories are valued at cost, or cost or market, whichever is lower.		18. Total deductions (line 9 plus line 17)	1,618 53
		19. Net profit (or loss) (line 1 minus line 18) (enter on line 9, page 1)	\$ 294 54

Explanation of deductions claimed in lines 5, 13, and 16: Legal fees - \$100; stenographic fees - \$20; and electric power - \$1.01

Schedule E.—EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES C, D, F, AND G

1. Kind of property (if building, state material of which constructed)	2. Date acquired	3. Cost or other basis	4. Assets fully depreciated to zero at end of year	5. Depreciation allowed for allowance in prior years	6. Remaining cost or other basis to be recovered	7. Estimated life used in computing depreciation	8. Estimated life from beginning of year	9. Depreciation allowable this year
Dwelling house at		\$	\$	\$	\$			\$
107 Upror Road,								
Baltimore, Md.	1930	28,500 00	-	4,275 00	24,225 00	20	16	1,425 00



Schedule F.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS. (See instruction 10)

1. Kind of property (if summary attach statement of descriptive details not shown below)	2. Date acquired Mo. Day Year	3. Date sold Mo. Day Year	4. Gross sales price (contract price)	5. Cost or other basis	6. Expenses of sale and cost of improvements subsequent to acquisition or March 1, 1913	7. Depreciation allowed (or allowable) since acquisition or March 1, 1913 (explain in Schedule E)	8. Gain or loss (column 4 plus column 7 minus the sum of columns 6 and 7)	9. Fair market value	10. Amount
SHORT-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD NOT MORE THAN 18 MONTHS									
			\$	\$	\$	\$	\$	100	\$
								100	
								100	
								100	
Total net short-term capital gain or loss (enter in line 1, column 2, of summary below)									\$

LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 18 MONTHS BUT NOT FOR MORE THAN 24 MONTHS

			\$	\$	\$	\$	\$	66%	\$
								66%	
								66%	
								66%	

LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 24 MONTHS

Irving Trust stock - 100 shares	12/6/35	1/7/38	1,171.00	1,875.00				70%	40	50	361.70
Domestic										50	
Total net long-term capital gain or loss (enter in line 2, column 2, of summary below)											\$ 361.70

SUMMARY OF CAPITAL NET GAINS OR LOSSES

1. Classification	2. Net gain or loss to be taken into account from columns 10, above		3. Net gain or loss to be taken into account from partnerships and "common trust funds"		4. Total net gain or loss to be taken into account in columns 2 and 3 of this summary	
	Gain	Loss	Gain	Loss	Gain	Loss
1. Total net short-term capital gain or loss (enter as item 10 (a), page 1, amount of gain shown in column 4)	\$	\$	\$	\$	\$	No net long-term capital gain or loss (enter in column 2)
2. Total net long-term capital gain or loss (enter as item 10 (b), page 1, amount of gain or loss shown in column 4)	\$	\$ 361.70	\$	\$	\$	\$ 361.70

State the family, fiduciary, or business relationship to you, if any, of purchaser of any of the above items:

If any of the above items were acquired by you other than by purchase, explain fully how acquired:

COMPUTATION OF ALTERNATIVE TAX

(To be used only in the case of a net long-term capital gain or loss)

1. Net income (item 20, page 1)	\$ 3,400.39	10. Normal tax (4% of line 9)	\$ 77.9
2. (a) Net long-term capital gain (item 10 (b), page 1)	175.85	11. Surtax on line 6 (See instruction 29)	
(b) Net long-term capital loss (item 10 (b), page 1)		12. Partial tax (line 10 plus line 11)	\$ 77.9
3. Ordinary net income (line 1 minus line 2 (a) or line 1 plus line 2 (b))	\$ 3,576.24	13. (a) 30% of net long-term capital gain (30% of line 2 (a))	
4. Less: Personal exemption. (From Schedule J-1)	\$ 1050.00	(b) 30% of net long-term capital loss (30% of line 2 (b))	\$ 52.7
5. Credit for dependents. (From Schedule J-2)	400.00	14. Alternative tax (line 12 plus line 13 (a) or line 12 minus line 13 (b))	\$ 25.2
6. Balance (surtax net income)	\$ 2,126.24	15. Total normal tax and surtax (item 30, page 1)	\$ 64.9
7. Less: Interest on Government obligations, etc. (See instruction 25)	\$	16. Tax liability (if a net long-term capital gain, on line 2 (a), enter line 14 or line 15, whichever is the lesser; if a net long-term capital loss, on line 2 (b), enter line 14 or line 15, whichever is the greater). (Enter as item 31, page 1)	\$ 64.9
8. Earned income credit. (From Schedule K-1 or K-2)	328.95		
9. Balance subject to normal tax	\$ 1,797.29		

Schedule G.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF PROPERTY OTHER THAN CAPITAL ASSETS (See instruction 10)

1. Kind of property	2. Date acquired	3. Gross sales price (contract price)	4. Cost or other basis	5. Expenses of sale and cost of improvements subsequent to acquisition or March 1, 1913	6. Depreciation allowed (or allowable) since acquisition or March 1, 1913 (explain in Schedule E)	7. Gain or loss (column 3 plus column 6 minus the sum of columns 4 and 5)
		\$	\$	\$	\$	\$
Total net gain (or loss) (enter as item 10 (c), page 1)						

State the family, fiduciary, or business relationship to you, if any, of purchaser of any of the above items:

If any of the above items were acquired by you other than by purchase, explain fully how acquired:



Schedule H.—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 13, 14, 15, 16, 17, AND 18

Item 13.—Taxes: California automobile tax (1936) \$13.35; stamp tax on stock transfers, \$12.15; California personal income tax accrued in 1936, \$45.10; Federal tax on club dues: Luyamaca Club, \$3.60; Bankers' Club, \$1.15, and La Colita Country Club, \$1.60; and Luyamaca Division tax on theater tickets, \$2.50; total \$85.45.

See accompanying schedule H for items 13, 14, 17, and 18.

Schedule I.—NONTAXABLE INCOME OTHER THAN INTEREST REPORTED IN SCHEDULE B. (See Instruction 12)

1. Source of income	2. Nature of income	3. Amount
		\$.

Schedule J.—EXPLANATION OF CREDITS CLAIMED IN ITEMS 22 AND 23. (See Instructions 22 and 23)

(A) Personal Exemptions			(B) Credit for Dependents		
Name	Number of months during the year in each status	Credits claimed	Name of dependent and relationship	Number of months during the year	Credits claimed
				Under 14 years old	Over 14 years old
Single, or married and not living with husband or wife		\$.	Mrs. M. F. Van Dusen—		\$.
Married and living with husband or wife	12	1,050.00	mother	12	400.00
Head of family (explain below)					
\$1,450 - balance of personal exemption claimed by wife, Mrs. Wanda Y. Van Dusen			Reason for support if over 18 years old		

Schedule K.—COMPUTATION OF EARNED INCOME CREDIT. (See Instruction 26)

(A) If your net income is \$3,000 or less, use only this part of schedule.		(B) If your net income is more than \$3,000, use only this part of schedule.	
Net income (Item 20, page 1)	\$	Earned net income (not more than \$14,000)	\$ 3,269.49
Earned income credit (10% of net income, above)		Net income (Item 20, page 1)	3,400.99
		Earned income credit (10% of earned net income or net income, above, whichever amount is smaller, but do not enter less than \$300)	326.95

QUESTIONS

1. State your principal occupation or profession Executive
2. Check whether you are a citizen ☒ or a resident alien ☐.
3. If you filed a return for the preceding year, by which Collector's office was it sent? Los Angeles, Calif.
4. Are items of income or deductions of both husband and wife included in this return? (See Instruction A.) No
5. State name of husband or wife if a separate return was made; personal occupation, if any, claimed thereon; and the Collector's

office to which it was sent Mrs. Wanda Y. Van Dusen
personal exemption \$1,450, Los Angeles, Calif.
 6. Check whether this return was prepared on the cash ☐ or
 accrual ☐ basis. Accrual for business
 7. Did you at any time during your taxable year own directly or
 indirectly any stock of a foreign corporation or a personal hold-
 ing company as defined by section 402? (Answer "yes" or
 "no") No (If answer is "yes," attach schedule
 required by Instruction M.)

AFFIDAVIT. (See Instruction F)

I/we swear (or affirm) that this return (including any accompanying schedules and statements) has been examined by me/us, and to the best of my/our knowledge and belief is a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Revenue Act of 1936 and the regulations issued under authority thereof.

Subscribed and sworn to by C. Van Dusen
 before me this 22 day of March, 1937

(Signature and title of officer administering oath)
 A return made by or against must be accompanied by power of attorney. (See Instruction F) (Date March 20, 1937)

(If this is a joint return (not made by agent), it must be signed by both husband and wife. It must be sworn to before a proper officer by the spouses preparing the return. If neither or both prepare the return, it must be sworn to by both spouses.)

AFFIDAVIT. (See Instruction F)

(If this return was prepared for you by some other person, the following affidavit must be executed)

I/we swear (or affirm) that I/we prepared this return for the person or persons named herein and that the return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the income tax liability of the person or persons for whom this return has been prepared of which I/we have any knowledge.

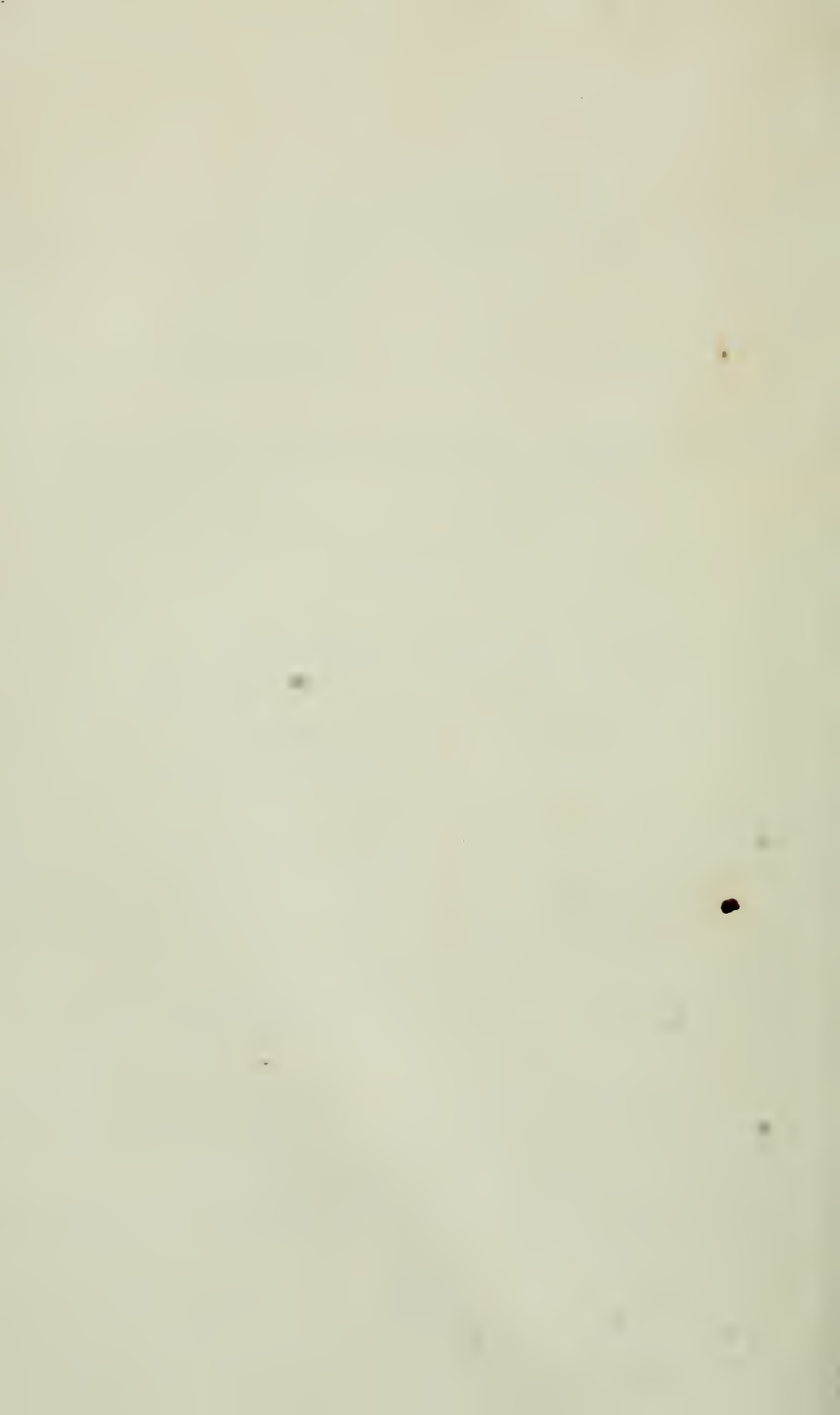
Subscribed and sworn to before me this _____ day
 of _____, 1937



(Signature of person preparing the return)

(Signature of person preparing the return)

(Signature and title of officer administering oath)



UNITED STATES
INDIVIDUAL INCOME TAX RETURN
YEAR 1938

C. A. Van Dusen And Wanda V. Van Dusen
3738 Amaryllis Drive, San Diego, California

SCHEDULE E
Explanation Of Deductions Claimed In Items 13, 14, 17, and 18

	<u>Total</u>	<u>C. A. Van Dusen</u>	<u>Wanda V. Van Dusen</u>
Item 13 - San Diego Community Chest	\$ 50.00	\$ 25.00	\$ 25.00
Item 14 - Interest paid:			
Bank of America, interest on note	\$ 874.99		
Baltimore National Bank, interest on mortgage	375.00		
Total	<u>\$1,249.99</u>	<u>\$ 624.99</u>	<u>\$ 625.00</u>
Item 17 - Bad debts:			
Uncollectible check for \$750.00 dated May 5, 1938, received from J. H. Luther of San Diego, California, in payment of an Oldsmobile coupe sold April 12, 1938	<u>\$ 750.00</u>	<u>\$ 375.00</u>	<u>\$ 375.00</u>
Item 18 - Other deductions authorized by law:			
Membership fee - Institute of Aeronautical Science	\$ 10.00		
Loss of two months rental on residence at 3211 Freeman Street, San Diego, California, vacated as a result of absence from the United States on business	180.00 <u>\$ 190.00</u>		
Total	<u>\$ 190.00</u>	<u>\$ 95.00</u>	<u>\$ 95.00</u>
Total	<u>\$2,239.99</u>	<u>\$1,119.99</u>	<u>\$1,120.00</u>



TREASURY DEPARTMENT
 INTERNAL REVENUE SERVICE
 939 South Broadway
 Los Angeles, California.

March 10, 1939.

In replying refer
to IT:LAL

C. A. VAN DUSEN,
 c/o Consolidated Aircraft Corporation,
 San Diego, California.

Sir:

Receipt is acknowledged of your application of recent
 date requesting, for the reasons therein given extension of time
 within which to file your return of income for the calendar year
 1938.

An extension of time to April 15, 1939, is hereby
 granted within which the above mentioned return may be filed and
 payment made of the installment of tax shown to be due thereon.

In all cases where an extension of time is granted
 interest shall be collected at the rate of one-half of one per
 cent a month upon each installment from the original due date
 thereof to the date of payment.

A copy of this letter must be attached to the return
 when it is filed as authority for the extension of time herein
 granted.

Respectfully,

Guy T. Helvering, COMMISSIONER

By

Nat Hogan
 COLLECTOR



UNITED STATES

Orig # 847411-15

1938 INDIVIDUAL INCOME TAX RETURN 1938

FOR NET INCOMES OF MORE THAN \$5,000 FROM SALARIES, WAGES,
DIVIDENDS, INTEREST, ANNUITIES, AND FOR INCOMES FROM
OTHER SOURCES REGARDLESS OF AMOUNTS

For Calendar Year 1938

or fiscal year beginning 1938, and ended 1939

(Before Preparing This Return, Read the Instructions Carefully)

To be filed with the Collector of Internal Revenue for your district not later than the 15th day of the third month following the close of your taxable year

PRINT NAME AND ADDRESS PLAINLY (See Instruction E)

A. 1928
R. C. A. Van Dusen

(Please) (Give given names of both husband and wife, & a joint return)

3625
AUG 13 1938 Amoryllis Drive

(Street and number, or rural route)

San Diego, California

(Post office)

(State)

TOTAL 23.34

372(a)

W. L. Date

510553 1940

510553

INCOME

1. Salaries and other compensation for personal services. (From Schedule A)	\$ 8,538 98	✓
2. Dividends	4,244 00	
3. Interest on bank deposits, notes, mortgages, etc.		
4. Interest on Government obligations, etc.		
5. Taxable interest on Government obligations, etc.		
6. Income (or loss) from partnerships, syndicates, pools, etc. (Other than capital assets)		
7. Income from fiduciaries		
8. Rents and royalties. (From Schedule C)		
9. Income from business or profession. (From Schedule D)		
10. (a) Net short-term gain from sale or exchange of capital assets. (From Schedule F)		
(b) Net long-term gain (or loss) from sale or exchange of capital assets. (From Schedule F)		
(c) Net gain (or loss) from sale or exchange of property other than capital assets. (From Schedule G)		
11. Other income (including income from annuities). (Check column and separate schedule if necessary)	1,500 00	
12. Total income in items 1 to 11. (Enter separately income in Schedule F)	\$ 10,711 81	✓
DEDUCTIONS of total income to wife, Wanda V. Van Dusen		
13. Contributions paid. (Explain in Schedule H)	\$ 28 00	
14. Interest. (Explain in Schedule H)	624 99	
15. Taxes. (Explain in Schedule H)	65 45	
16. Losses from fire, storm, shipwreck, or other casualty, or theft. (Explain in Schedule H)		
17. Bad debts. (Explain in Schedule H)	578 00	
18. Other deductions authorized by law. (Explain in Schedule H)	96 00	
19. Total deductions in items 13 to 18	1,205 44	✓
20. Net income (Item 12 minus item 19)	\$ 4,150 39	✓

COMPUTATION OF TAX

21. Net income (Item 20 above)	\$ 4,150 39	22. Normal tax (4% of item 21)	\$ 91 94
22. Less: Personal exemption. (From Schedule J-1)	\$ 1,050 00	23. Surtax on item 24. (See Instructions K)	
23. Credit for dependents. (From Schedule J-2)	400 00	24. Total (item 22 plus item 23)	\$ 91 94
24. Balance (surtax net income)	\$ 2,700 39	25. Total tax (item 24, or if you have a term capital gain or loss, enter line 14, Schedule F)	\$ 91 94
25. Less: Income tax paid at source		26. Earned income credit. (From Schedule K-1 or K-2)	
26. Earned income credit	401 95	27. Balance of tax (item 25 minus item 26 and 27)	\$ 91 94
27. Balance subject to normal tax	\$ 2,298 44	28. Balance of tax (item 27 minus item 26 and 27)	\$ 91 94

NOTE—One form marked "DUPLICATE COPY" must be filed with the original return (It will be assessed if duplicate copy is not filed)



Schedule A.—INCOME RECEIVED FROM OTHERS CONSISTING OF SALARIES, WAGES, FEES, AND OTHER COMPENSATION FOR PERSONAL SERVICES. (See Instruction 1)

1. Name and address of employer and nature of income	2. Amount	3. Expenses (deduct)	4. Amount
Consolidated Aircraft Corporation ; Lindbergh Field, San Diego, Calif.		Less: Salary earned while employed outside of United States from 1/15/38 to 8/15/39 (7 mos.)	8,600 01
Gross Salary	15,205 04	Less: 1. California unemployment insurance tax on 15,205 04	66 06
Total of column 2 minus total of column 4 (enter as item 1, page 1)			\$ 6,538 98

Schedule B.—INTEREST ON GOVERNMENT OBLIGATIONS, ETC. (See Instruction 5)

1. Obligations or securities	2. Amount owned at end of year on basis of your proportionate share of such obligations held by estates, trusts, partnerships, or common trust funds	3. Interest received or accrued during the year	4. Interest exempt from taxation	5. Interest on amount in excess of exemption
(a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions	\$	\$	All	*****
(b) Obligations issued under Federal Farm Loan Act, or under such Act as amended			All	*****
(c) Obligations of United States issued on or before September 1, 1917			All	*****
(d) Treasury Notes, Treasury Bills, and Treasury Certificates of Indebtedness			All	*****
(e) United States Savings Bonds and Treasury Bonds			\$	\$
(f) Obligations of instrumentalities of the United States (other than obligations to be reported in (b) above)			None	
(g) Total (enter as item 5, page 1)				\$

Schedule C.—INCOME FROM RENTS AND ROYALTIES. (See Instruction 6)

1. Kind of property	2. Amount	3. Depreciation (explain in Schedule E)	4. Repairs (explain below)	5. Other expenses (explain below)	6. Net profit (columns 2 minus sum of columns 3, 4, and 5) (enter as item 6, page 1)
Royalties from Counter Thrust Square Shear Dwelling house at 107 Upnor Road, Baltimore, Md.	\$ 601 33	\$	\$	\$	\$ 601 33
		1,425 00	(2) 75 00	(1) 26 60	1,526 50
					925 17

Explanation of deductions (1) Roland Park maintenance tax claimed in columns 4 and 5 (2) Repairs - painting

Schedule D.—PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION. (See Instruction 9)

1. Total receipts (state nature of business or profession). Final disposition of Counter Thrust Square Shear venture		2. COST OF GOODS SOLD		3. OTHER BUSINESS DEDUCTIONS		4. Net profit (or loss) (line 1 minus line 3) (enter as item 9, page 1)
2. Labor	\$ 156 20	10. Salaries not included as "Labor" (do not deduct compensation for yourself)	\$			
3. Material and supplies	39 85	11. Interest on business indebtedness				
4. Merchandise bought for sale		12. Taxes on business and business property				
5. Other costs (itemize below)	121 01	13. Losses (explain below)				
6. Plus inventory at beginning of year	1,301 47	14/ Bad debts arising from sales or services				
7. Total (lines 2 to 6)	\$ 1,618 53	15. Depreciation, obsolescence, and depletion (explain in Schedule E)				
8. Less inventory at end of year		16. Rep. repairs, and other expenses (itemize below or on separate sheet)				
9. Net cost of goods sold (line 7 minus line 8)	\$ 1,618 53	17. Total (lines 10 to 16)				
Enter "C," "or" "M," on lines 6 and 8 to indicate whether inventories are valued at cost, or cost or market, whichever is lower.		18. Total deductions (line 9 plus line 17)				1,618 53
		19. Net profit (or loss) (line 1 minus line 18) (enter as item 9, page 1)				\$ 294 54

Explanation of deductions claimed in lines 5, 13, and 16 Legal fees - \$100; stenographic fees - \$20; and electric power - \$1.01

Schedule E.—EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES C, D, F, AND G

1. Kind of property (if buildings, state material of which constructed)	2. Date acquired	3. Cost or other basis	4. Assets fully depreciated in use at end of year	5. Depreciation allowed (or allowable) in prior years	6. Remaining cost or other basis to be recovered	7. Estimated life used in accumulating depreciation	8. Estimated remaining life from beginning of year	9. Depreciation allowable this year
Dwelling house at 107 Upnor Road, Baltimore, Md.	1930	28500 00	-	4275 00	24225 00	20	16	1425 00



Schedule F.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS. (See Instruction 10)

Page 3

1. Kind of property (if necessary attach statement of description; do not show below)	2. Date acquired Mo. Day Year	3. Date sold Mo. Day Year	4. Gross sales price (contract price)	5. Cost or other basis	6. Expense of sale and cost of improvement's subsequent to acquisition or March 1, 1913 (explain in Schedule F)	7. Depreciation allowed (or allowable) since acquisition or March 1, 1913 (explain in Schedule F)	8. Gain or loss (column 4 plus column 7 minus the sum of columns 5 and 6)	9. Description	10. Amount
SHORT-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD NOT MORE THAN 12 MONTHS									
			\$	\$	\$	\$	\$		\$
									100
									100
									100
									100
Total net short-term capital gain or loss (enter in line 1, column 2, of summary below)									\$

LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 12 MONTHS BUT NOT FOR MORE THAN 24 MONTHS									
			\$	\$	\$	\$	\$		\$
									66 2/3
									66 2/3
									66 2/3
									66 2/3
Total net long-term capital gain or loss (enter in line 1, column 2, of summary below)									\$
LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 24 MONTHS									
			\$	\$	\$	\$	\$		\$
									50
									50
									50
									50
Total net long-term capital gain or loss (enter in line 2, column 2, of summary below)									\$
									\$ 351.70

SUMMARY OF CAPITAL NET GAINS OR LOSSES									
1. Character	2. Net gain or loss to be taken into account from column 10, above		3. Net gain or loss to be taken into account from purchases and "common trust funds"		4. Total net gain or loss to be taken into account on columns 2 and 3 of this summary				
	Gain	Loss	Gain	Loss	Gain	Loss			
1. Total net short-term capital gain or loss (enter on item 10 (a), page 1, amount of gain shown in column 4)	\$	\$	\$	\$	\$	\$			
2. Total net long-term capital gain or loss (enter on item 10 (b), page 1, amount of gain or loss shown in column 4)	\$	\$	\$	\$	\$	\$			
		\$ 351.70							
Total net gain or loss (enter on item 10 (c), page 1, amount of gain or loss shown in column 4)									

State the family, fiduciary, or business relationship to you, if any, of purchaser of any of the above items: _____
 If any of the above items were acquired by you other than by purchase, explain fully how acquired: _____

COMPUTATION OF ALTERNATIVE TAX (To be used only in the case of a net long-term capital gain or loss)									
1. Normal tax (4% of line 9)	\$	\$	\$	\$	\$	\$	\$	\$	\$
2. Surplus on line 6 (See Instruction 29)	\$	\$	\$	\$	\$	\$	\$	\$	\$
3. Partial tax (line 10 plus line 11)	\$	\$	\$	\$	\$	\$	\$	\$	\$
4. 30% of net long-term capital gain (30% of line 2 (a))	\$	\$	\$	\$	\$	\$	\$	\$	\$
5. 30% of net long-term capital loss (30% of line 2 (b))	\$	\$	\$	\$	\$	\$	\$	\$	\$
6. Alternative tax (line 12 plus line 13 (a) or line 12 minus line 13 (b))	\$	\$	\$	\$	\$	\$	\$	\$	\$
7. Total normal tax and surplus (item 30, page 1)	\$	\$	\$	\$	\$	\$	\$	\$	\$
8. Tax liability (if net long-term capital gain, on line 2 (a), enter line 14 or line 15, whichever is the lesser; if a net long-term capital loss, on line 2 (b), enter line 14 or line 15, whichever is the greater) (Enter as item 31, page 1)	\$	\$	\$	\$	\$	\$	\$	\$	\$
9. Total normal tax and surplus (item 30, page 1)	\$	\$	\$	\$	\$	\$	\$	\$	\$
10. Tax liability (if net long-term capital gain, on line 2 (a), enter line 14 or line 15, whichever is the lesser; if a net long-term capital loss, on line 2 (b), enter line 14 or line 15, whichever is the greater) (Enter as item 31, page 1)	\$	\$	\$	\$	\$	\$	\$	\$	\$

Schedule G.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF PROPERTY OTHER THAN CAPITAL ASSETS (See Instruction 10)

1. Kind of property	2. Date acquired	3. Gross sales price (contract price)	4. Cost or other basis	5. Expense of sale and cost of improvement's subsequent to acquisition or March 1, 1913	6. Depreciation allowed (or allowable) since acquisition or March 1, 1913 (explain in Schedule E)	7. Gain or loss (column 3 plus column 6 minus the sum of columns 4 and 5)
		\$	\$	\$	\$	\$
Total net gain (or loss) (enter on item 10 (c), page 1)						

State the family, fiduciary, or business relationship to you, if any, of purchaser of any of the above items: _____
 If any of the above items were acquired by you other than by purchase, explain fully how acquired: _____

D-9



Schedule H.—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 13, 14, 15, 16, 17, AND 18

Page 4

Item 15.—Taxes: California automobile tax (1938) \$13.56; stamp tax on stock transfers, \$12.15; California personal income tax accrued in 1938, \$49.10; Federal tax on club dues: Cuyamaca Club, \$3.60; Bankers' Club, \$1.13, and LaJolla Country Club, \$3.60; and Federal Admission tax on theater tickets, \$0.50; total, \$65.43.
See accompanying schedule H for items 13, 14, 17 and 18.

Schedule I.—NONTAXABLE INCOME OTHER THAN INTEREST REPORTED IN SCHEDULE B. (See Instruction 12)

1. Source of income	2. Nature of income	3. Amount
		\$

Schedule J.—EXPLANATION OF CREDITS CLAIMED IN ITEMS 22 AND 23. (See Instructions 22 and 23)

(1) Personal Exemption			(2) Credit for Dependents			
Status	Number of months during the year in such status	Credit claimed	Name of dependent and relationship	Number of months during the year Under 18 years old Over 18 years old	Credit claimed	
Single, or married and not living with husband or wife		\$	Mrs. M. F. Van Dusen		\$	
Married and living with husband or wife	12	1,050 00	Mother	12	400 00	
Head of family (explain below)						
\$1,450—balance of personal exemption claimed by wife, Mrs. Wanda V. Van Dusen						
Reason for support if over 18 years old						

Schedule K.—COMPUTATION OF EARNED INCOME CREDIT. (See Instruction 26)

(1) If your net income is \$3,000 or less, use only this part of schedule	(2) If your net income is more than \$3,000, use only this part of schedule
Net income (item 20, page 1) \$	Earned net income (not more than \$14,000) \$ 4,110 32
Earned income credit (10% of net income, above)	Net income (item 20, page 1) 4,019 50
	Earned income credit (10% of earned net income or net income, above, whichever amount is smaller, but do not enter less than \$300) 401 95

QUESTIONS

- State your principal occupation or profession. Executive
- Check whether you are a citizen ☒ or a resident alien ☐.
- If you filed a return for the preceding year, to which Collector's office was it sent? Los Angeles, Calif.
- Are items of income or deductions of both husband and wife included in this return? (See Instruction A) No
- State name of husband/wife if a separate return was made; personal exemption, if any, claimed thereon; and the Collector's office to which it was sent. Mrs. Wanda V. Van Dusen personal exemption \$1450. Los Angeles, Calif.
- Check whether this return was prepared on the cash ☐ or accrual ☐ basis. Cash for personal
- Did you at any time during your taxable year own directly or indirectly any stock of a foreign corporation or a personal holding company as defined by section 402? (Answer "yes" or "no") No. (If answer is "yes," attach schedule required by Instruction M.)

AFFIDAVIT. (See Instruction F)

I/we swear (or affirm) that this return (including any accompanying schedules and statements) has been examined by me/us, and to the best of my/our knowledge and belief is a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Revenue Act of 1938 and the regulations issued under authority thereof.

Subscribed and sworn to by Wanda V. Van Dusen
before me this 31 day of January, 1939

(Signature) (See Instruction F)

(Signature)

(If this is a joint return (not made by agent), it must be signed by both husband and wife. It must be sworn to before a proper officer by the spouse preparing the return. If neither or both prepare the return, it must be sworn to by both spouses.)

AFFIDAVIT. (See Instruction F)

(If this return was prepared for you by some other person, the following affidavit must be executed)

I/we swear (or affirm) that I/we prepared this return for the person or persons named herein and that the return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the income tax liability of the person or persons for whom this return has been prepared of which I/we have any knowledge.

Subscribed and sworn to before me this _____ day
of _____, 1939

(Signature of person preparing the return)

(Signature of person preparing the return)



CONSOLIDATED AIRCRAFT CORPORATION
LINDBERGH FIELD, SAN DIEGO, CALIF.

UNITED STATES
INDIVIDUAL INCOME TAX RETURN
YEAR 1938

C. A. Van Dusen And Wanda V. Van Dusen
3738 Araryllis Drive, San Diego, California

SCHEDULE H
Explanation Of Deductions Claimed In Items 13, 14, 17, and 18

	Total	C. A. Van Dusen	Wanda V. Van Dusen
Item 13 - San Diego Community Chest	\$ 50.00	\$ 25.00	\$ 25.00
Item 14 - Interest paid:			
Bank of America, interest on note	\$ 874.99		
Baltimore National Bank, interest on mortgage	375.00		
Total	<u>\$1,249.99</u>	<u>\$ 624.99</u>	<u>\$ 625.00</u>
Item 17 - Bad Debts:			
Uncollectible check for \$750.00 dated May 5, 1938, received from J. H. Luther of San Diego, California, in payment of an Oldsmobile coupe sold April 12, 1938	\$ 750.00	\$ 375.00	\$ 375.00
Item 18 - Other deductions authorized by law:			
Membership fee - Institute of Aeronautical Science	\$ 10.00		
Loss of two months rental on residence at 3211 Freeman Street, San Diego, California, vacated as a result of absence from the United States on business	180.00		
Total	<u>\$ 190.00</u>	<u>\$ 95.00</u>	<u>\$ 95.00</u>
Total	<u>\$2,239.99</u>	<u>\$1,119.99</u>	<u>\$1,120.00</u>



C. A. AND WANDA V. VAN DUSEN

SUMMARY OF ADDITIONAL TAX AND INTEREST DUE ON AMENDED
FEDERAL INCOME TAX RETURN FOR THE YEAR 1937.

	<u>Total</u>	<u>C. A. Van Dusen</u>	<u>Wanda V. Van Dusen</u>
Tax due as shown on accompanying amended tax return	\$ 297.61	\$ 148.31	\$ 149.30
Less tax assessed and paid on original tax return	<u>309.34</u>	<u>154.67</u>	<u>154.67</u>
Remainder - additional tax due (excess of tax as shown on amended return over tax shown on original return)	\$ 11.73	\$ 6.36	\$ 5.37
Plus interest at $\frac{1}{2}$ of 1% a month for $13\frac{1}{2}$ months from March 16, 1938 to April 30, 1939 - 6-3/4%	<u>.79</u>	<u>.43</u>	<u>.36</u>
Total interest and tax due	<u><u>\$ 12.52</u></u>	<u><u>\$ 6.79</u></u>	<u><u>\$ 5.73</u></u>



CONSOLIDATED AIRCRAFT CORPORATION
LINDBERGH FIELD, SAN DIEGO, CALIF.

UNITED STATES
INDIVIDUAL INCOME TAX RETURN
YEAR 1937.

C. A. VAN DUSEN, 3211 FREEMAN STREET, SAN DIEGO, CAL.

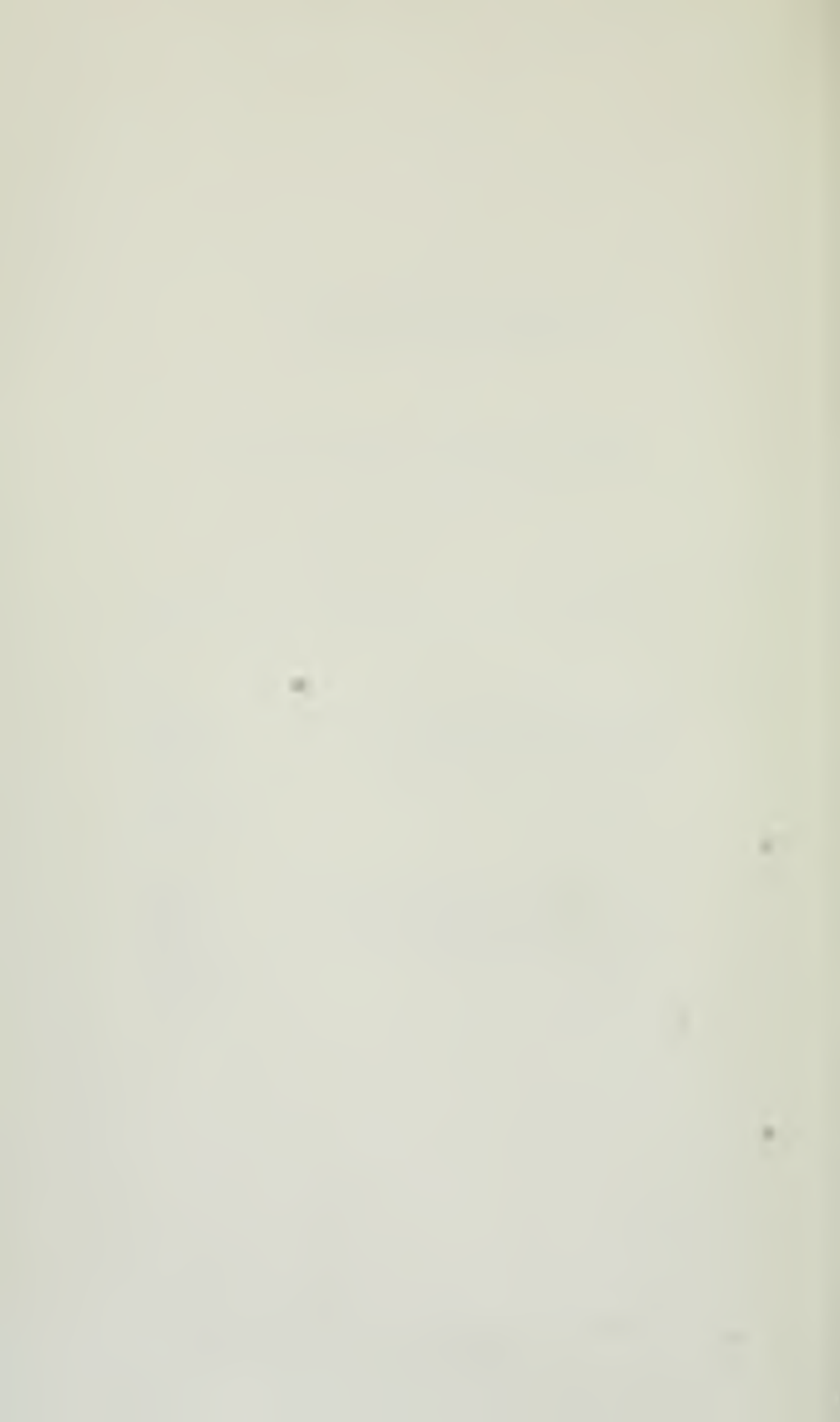
Schedule D - Profit (or Loss) From Business or Profession
Supplementary data explaining deductions.

Labor	-	Fay L. Smith	\$ 726.30	
		H. M. Pryor.....	45.00	
		Edwin S. Kahlie.....	11.20	\$ 782.50
Material	-	Castings, parts, motors, etc.....	\$ 654.12	
		Miscellaneous small parts and supplies	154.98	
		Lumber.....	15.87	824.87
Expenses	-	Space rental.....	\$ 70.00	
		Machine Rental.....	165.98	
		Machine Shop Service.....	27.90	
		Drafting Service.....	50.00	
		Electricians' Services.....	13.26	
		Electricity.....	4.09	
		Transportation charges.....	65.59	
		Workmens Compensation Insurance.....	14.64	
		All other.....	1.78	411.00
Total	-			\$ 2,018.37

Loss inventory at end of year (at cost or market whichever is lower)

One model Counter Thrust Square Shear and certain accessories.....	\$ 975.00	
Material and parts.....	325.47	
(The above value at selling prices to licensee January 14, 1938).....		1,301.47

Net loss		\$ 716.90
----------	--	-----------



Power of Attorney

I hereby appoint Irma S. Robbins as my attorney in fact for the purpose of executing my Federal income tax return for the year 1937. Mrs. Robbins is authorized to act in my place and stead in all matters relating to the filing of this income tax report.

/s/ C. A. VAN DUSEN.

Subscribed and sworn to before me this 5th day of January, 1938.

/s/ JEAN HENLEY,
Notary Public.

My Commission Expires March 28, 1940. [42]

United States
Individual Income Tax Return
Year 1938

C. A. Van Dusen and Wanda V. Van Dusen
3738 Amaryllis Drive, San Diego, California

Schedule explaining Item 11, Other Income—

The \$1500 represents the fair market value at February 23, 1938, of 1500 shares of the common stock of Aero Industries Technical Institute, 5245 West San Fernando Road, Los Angeles, California, received in consideration for serving on the Board of Directors and Executive Committee of that corporation. [43]



INDIVIDUAL INCOME TAX RETURN 1939

FOR NET INCOMES OF MORE THAN \$5,000 FROM SALARIES, WAGES,
DIVIDENDS, INTEREST, ANNUITIES, AND FOR INCOMES FROM
OTHER SOURCES REGARDLESS OF AMOUNTS

For Calendar Year 1939

or fiscal year beginning 1939, and ended 1940

To be filed with the Collector of Internal Revenue for your district not later than the 15th day of the first month following the close of your taxable year

PRINT NAME AND ADDRESS PLAINLY. (See Instruction C)

C. A. Van Dusen

(Please give names of both husband and wife, if this is a joint return)

3738 Ameryllis Drive

(Street and number, or rural route)

San Diego

San Diego

California

(Post office)

(County)

(State)

INCOME

1. Salaries and other compensation for personal services. (From Schedule A)	\$ 15,866	73
2. Dividends	1,384	00
3. Interest on bank deposits, notes, mortgages, etc.		
4. Interest on corporate bonds		
5. Taxable interest on Government obligations, etc. (From Schedule B)		
6. Income (or loss) from partnerships, syndicates, pools, etc. (other than capital gains or losses). (Provide names and addresses)		
7. Income from scholarships. (Provide names and addresses)		
8. Rents and royalties. (From Schedule C)		
9. Income (or loss) from business or profession. (From Schedule D)		
10. (a) Net short-term gain from sale or exchange of capital assets. (From Schedule F)		
(b) Net long-term gain (or loss) from sale or exchange of capital assets. (From Schedule F)		
(c) Net gain (or loss) from sale or exchange of property other than capital assets. (From Schedule G)		
11. Other income (including income from annuities) (State source)		
12. Total income in items 1 to 11. (Enter net taxable income in Schedule F)	\$ 18,878	42
Remainder after transfer of one-half of total income to wife	8,339	21
13. Contributions paid. (Apply to Schedule F)	\$ 12	50
14. Interest. (Apply to Schedule F)	1,103	98
15. Taxes. (Apply to Schedule F)	681	67
16. Losses from fire, storm, shipwreck, or other casualty, or theft. (Apply to Schedule F)		
17. Bad debts. (Apply to Schedule F)	5	00
18. Other deductions authorized by law. (Apply to Schedule F)		
19. Total deductions in items 13 to 18	1,803	15
20. Net income (item 12 minus item 19)	\$ 6,538	06

COMPUTATION OF TAX

21. Net income (item 20 above)	\$ 6,538	06
22. Less: Personal exemption. (From Schedule J-1)	\$ 1,060	00
23. Credit for dependents. (From Schedule J-2)	400	00
24. Balance (surplus net income)	\$ 5,078	06
25. Less: Income on Government obligations, etc. (See Instruction B)		
26. Earned income credit. (From Schedule E-1 or E-2)	653	61
27. Balance subject to normal tax	\$ 4,424	45
28. Normal tax (4% of item 27)	\$ 177	80
29. Surtax on item 24. (See Instruction 27)	43	44
30. Total (item 28 plus item 29)	\$ 220	74
31. Total tax (item 30, or if you had a net long-term capital gain or loss, enter line 16, Schedule F)	\$ 220	74
32. Less: Income tax paid at SOURCE		
33. Income tax paid to a foreign country or U.S. possession. (Attach Form 114)		
34. Balance of tax (item 31 minus items 32 and 33)	\$ 220	74

NOTE—One form marked "DUPLICATE COPY" must be filed with this original return (35 will be assessed if duplicate copy is not filed)

E x . B .



Schedule A.—INCOME RECEIVED FROM OTHERS CONSISTING OF SALARIES, WAGES, FEES, AND OTHER COMPENSATION FOR PERSONAL SERVICES. (See Instruction 1)

1. Name and address of employer and nature of service	2. Amount	3. Expenses (deduct)	4. Amount
Consolidated Aircraft Corp. Randbergh Field, San Diego, California. Gross Salary	\$ 16,020 00	Unemployment - California unemployment insurance tax	\$ 153 35
Total of column 2 minus total of column 4 (enter as item 1, page 1)			\$ 15,866 73

Schedule B.—INTEREST ON GOVERNMENT OBLIGATIONS, ETC. (See Instruction G)

1. Obligations or securities	2. Amount owned at end of year including your proportionate share of such obligations held by estates, trusts, partnerships, or common trust funds	3. Interest received or accrued during the year	4. Interest exempt from taxation	5. Interest on amounts in excess of exemption
Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions	\$	\$	All	
Obligations issued under Federal Farm Loan Act, or under such Act as amended			All	
Obligations of United States issued on or before September 1, 1917			All	
Treasury Notes, Treasury Bills, and Treasury Certificates of Indebtedness			All	
United States Savings Bonds and Treasury Bonds			\$	\$
Obligations of instrumentalities of the United States (other than obligations to be reported in (1) above)			None	
Total (enter as item 5, page 1)				\$

Schedule C.—INCOME FROM RENTS AND ROYALTIES. (See Instruction 8)

1. Kind of property	2. Amount	3. Depreciation (explain in Schedule E)	4. Repairs (explain below)	5. Other expenses (itemize below)	6. Net profit (column 2 minus sum of columns 3, 4, and 5) (enter as item 8, page 1)
Orthill, Inc. royalty on quartz shears	\$ 552 94			(2) 150 00	\$ 402 94
rental from dwelling house at 107 Umor Road, Baltimore, Maryland	800 00	1,425 00 (1)	37 75 (3)	92 50	255 25
Explanation of deductions claimed in columns 4 and 5	(1) Snow shields \$2.00, shrubbery \$6.00 and painting \$29.75 (2) -3- trips to Los Angeles at \$50.00 each (3) Roland Park Company, maintenance tax \$26.50, commission \$66.00				

Schedule D.—PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION. (See Instruction 9)

State business name and address if different from name and address on page 1				\$
Total receipts (state nature of business or profession)				
COST OF GOODS SOLD		OTHER BUSINESS DEDUCTIONS		
Labor	\$	10. Salaries not included as "Labor" (do not deduct compensation for yourself)	\$	
Material and supplies		11. Interest on business indebtedness		
Merchandise bought for sale		12. Taxes on business and business property		
Other costs (itemize below)		13. Losses (explain below)		
Plus inventory at beginning of year		14. Bad debts arising from sales or services		
Total (lines 2 to 6)	\$	15. Depreciation, obsolescence, and depletion (explain in Schedule E)		
Less inventory at end of year		16. Rent, repairs, and other expenses (itemize below or on separate sheet)		
Net cost of goods sold (line 7 minus line 8)	\$	17. Total (lines 10 to 16)	\$	
If the production, manufacture, purchase and sale of merchandise is an income-producing factor, inventories are required. Enter "C," "I," or "M," on lines 6 and 8 to indicate whether inventories are valued at cost, or cost or market, whichever is lower.				
Total (lines 2 to 6)		18. Total deductions (line 9 plus line 17)		
Net profit (or loss) (line 1 minus line 18) (enter as item 9, page 1)		19. Net profit (or loss) (line 1 minus line 18) (enter as item 9, page 1)		
Explanation of deductions claimed in lines 5, 13, and 16				

Schedule E.—EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES C, D, F, AND G

1. Kind of property (if buildings, state material of which constructed)	2. Date acquired	3. Cost or other basis	4. Assets fully depreciated in use at end of year	5. Depreciation allowed (or allowable) in prior years	6. Remaining cost or other basis to be recovered	7. Estimated life used in computing depreciation	8. Estimated remaining life from beginning of year	9. Depreciation for the taxable year
Dwelling house at 107 Umor Road Baltimore, Maryland	1930	28,500 00	-	5,700 00	22,800 00	20	15	1,425 00



Schedule F.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS. (See Instruction 10)

Page 8

1. Kind of property (If summary attach statement of descriptive details not shown below)	2. Date acquired Mo. Day Year	3. Date sold Mo. Day Year	4. Gross sales price (contract price)	5. Cost or other basis	6. Expenses of sale and cost of improvements subsequent to acquisition or March 1, 1913	7. Depreciation allowed (or allowable) since acquisition or March 1, 1913 (explain in Schedule E)	8. Gain or loss (columns 4 plus columns 6 minus the sum of columns 5 and 7)	9. Gain or loss to be taken into account A. Percentage B. Amount
SHORT-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD NOT MORE THAN 12 MONTHS								
			\$	\$	\$	\$	\$	100 %
								100
								100
								100
Total net short-term capital gain or loss (enter in line 1, column 3, of summary below)								\$

LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 12 MONTHS BUT NOT FOR MORE THAN 36 MONTHS								
			\$	\$	\$	\$	\$	66%
								66%
								66%
								66%
Total net long-term capital gain or loss (enter in line 2, column 3, of summary below)								\$

SUMMARY OF CAPITAL NET GAINS OR LOSSES								
1. Classification	2. Net short-term capital gain or loss of preceding taxable year (net of net income for each year)	3. Net gain or loss to be taken into account from column 10, above		4. Net gain or loss to be taken into account from preceding and "current" tax funds		5. Total net gain or loss to be taken into account in columns 2, 3, and 4 of this summary		
		Gain	Loss	Gain	Loss	Gain	Loss	
Total net short-term capital gain or loss (enter in item 10 (a), page 1, amount of gain shown in column 5)	\$	\$	\$	\$	\$	\$	\$	No net loss allowable (see Instruction 10)
Total net long-term capital gain or loss (enter as item 10 (b), page 1, amount of gain or loss shown in column 5)	\$	\$	\$	\$	\$	\$	\$	

the family, fiduciary, or business relationship to you, if any, of purchaser of any of the above items:
any of the above items were acquired by you other than by purchase, explain fully how acquired:

COMPUTATION OF ALTERNATIVE TAX (To be used only in the case of a net long-term capital gain or loss)			
Net income (Item 20, page 1). (See Instruction 10)	\$	10. Normal tax (4% of line 9)	\$
(a) Net long-term capital gain (Item 10 (b), page 1)	\$	11. Surtax on line 6. (See Instruction 25)	\$
(b) Net long-term capital loss (Item 10 (b), page 1)	\$	12. Partial tax (line 10 plus line 11)	\$
Ordinary net income (line 1 minus line 2 (a) or line 1 plus line 2 (b)). (See Instruction 10)	\$	13. (a) 30% of net long-term capital gain (30% of line 2 (a))	\$
Less: Personal exemption. (From Schedule J-1)	\$	(b) 30% of net long-term capital loss (30% of line 2 (b))	\$
Credits for dependents. (From Schedule J-2)	\$	14. Alternative tax (line 12 plus line 13 (a) or line 12 minus line 13 (b))	\$
Normal tax (surtax net income)	\$	15. Total normal tax and surtax (Item 30, page 1)	\$
Less: Interest on Government obligations, etc. (See Instruction 25)	\$	16. Tax liability (if a net long-term capital gain, on line 2 (a), enter line 14 or line 15, whichever is the lesser; if a net long-term capital loss, on line 2 (b), enter line 14 or line 15, whichever is the greater). (Enter as item 31, page 1)	\$
Earned income credit. (From Schedule K-1 or K-2). (See Inst. 10)	\$		
Amount subject to normal tax	\$		

Schedule G.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF PROPERTY OTHER THAN CAPITAL ASSETS (See Instruction 10)								
1. Kind of property	2. Date acquired	3. Gross sales price (contract price)	4. Cost or other basis	5. Expenses of sale and cost of improvements subsequent to acquisition or March 1, 1913	6. Depreciation allowed (or allowable) since acquisition or March 1, 1913 (explain in Schedule E)	7. Gain or loss (columns 3 plus columns 5 minus the sum of columns 4 and 6)		
		\$	\$	\$	\$	\$		
Total net gain (or loss) (enter as item 10 (c), page 1)							\$	

the family, fiduciary, or business relationship to you, if any, of purchaser of any of the above items:
any of the above items were acquired by you other than by purchase, explain fully how acquired:



Schedule H.—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 13, 14, 15, 16, 17, AND 18

Page 4

1. Item No.	2. Explanation	3. Amount	1. Item No. (Continued)	2. Explanation (Continued)	3. Amount (Continued)
		\$			\$

Schedule I.—NONTAXABLE INCOME OTHER THAN INTEREST REPORTED IN SCHEDULE B. (See Instruction G)

1. Source of income	2. Nature of income	3. Amount
		\$

Schedule J.—EXPLANATION OF CREDITS CLAIMED IN ITEMS 22 AND 23. (See Instructions 22 and 23)

(1) Personal Exemption

Status	Number of months during the year in each status	Credit claimed
Single, or married and not living with husband or wife.		\$
Married and living with husband or wife.	12	1,050.00
Head of family (explain below).		

(2) Credit for Dependents

Name of dependent and relationship	Number of months during the year		Credit claimed
	Under 18 years old	Over 18 years old	
Mrs. M. F. Van Dusen			\$
Mother	12		400 00

\$1,450 - balance of personal exemption claimed by wife Wanda V. Van Dusen

Reason for support 84 yrs. old, no other means of if over 18 years old support.

Schedule K.—COMPUTATION OF EARNED INCOME CREDIT. (See Instruction 26)

(1) If your net income is \$3,000 or less, use only this part of schedule

Net income (item 20, page 1)	\$
Earned income credit (10% of net income, above)	

(2) If your net income is more than \$3,000, use only this part of schedule

or \$15,866.75 salary	
Earned net income (not more than \$14,000)	\$ 7,933.37
Net income (item 20, page 1)	6,536.06
Earned income credit (10% of earned net income or 10% of net income, above, whichever amount is smaller, but do not enter less than \$300)	653.61

QUESTIONS

1. State your principal occupation or profession. Executive
2. Check whether you are a citizen ☒ or a resident alien ☐.
3. If you filed a return for the preceding year, to which Collector's office was it sent? Los Angeles, California
4. Are items of income or deductions of both husband and wife included in this return? No
5. State (a) Name of husband or wife if separate return was made Wanda V. Van Dusen

- (b) Personal exemption, if any, claimed thereon \$1,450
- (c) Collector's office to which it was sent Los Angeles, Cal.
6. Check whether this return was prepared on the cash ☒ or accrual ☐ basis.
7. Did you at any time during your taxable year own directly or indirectly any stock of a foreign corporation or a personal holding company as defined by section 501? (Answer "yes" or "no") No (If answer is "yes," attach statement required by Instruction J.)

AFFIDAVIT. (See Instruction E)

I/we swear (or affirm) that this return (including any accompanying schedules and statements) has been examined by me/us, and to the best of my/our knowledge and belief is a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Internal Revenue Code, as amended, and the regulations issued under authority thereof.

Subscribed and sworn to by C. A. Van Dusen
before me this 15 day of March, 1940

[Signature]
(Signature) (See Instruction E)

A return made by an agent must be accompanied by power of attorney. (See Instruction E)
My Commission expires March 25, 1940

AFFIDAVIT. (See Instruction E)

(If this return was prepared for you by some other person, the following affidavit must be executed)

I/we swear (or affirm) that I/we prepared this return for the person or persons named herein and that the return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the income tax liability of the person or persons for whom this return has been prepared of which I/we have any knowledge.

Subscribed and sworn to before me this _____ day
of _____, 1940

(Signature of person preparing the return)

(Signature of person preparing the return)



B+



CONSOLIDATED AIRCRAFT CORPORATION
LINDBERGH FIELD, SAN DIEGO, CALIF.

UNITED STATES
INDIVIDUAL INCOME TAX RETURN
FORM 1040
YEAR 1939

C. A. VAN DUSEN AND WANDA V. VAN DUSEN.
3738 AMARYLLIS DRIVE, SAN DIEGO, CALIFORNIA

SCHEDULE H.

EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 13, 14 AND 15

	TOTAL	C. A. VAN DUSEN	WANDA V. VAN DUSEN
ITEM 13 - CONTRIBUTIONS:			
San Diego Community Chest	\$ 25.00	\$ 12.50	\$ 12.50
ITEM 14 - INTEREST PAID:			
Bank of America, note	\$1444.45	\$ 722.23	\$ 722.22
Baltimore National Bank, mortgage on dwelling house	750.00	375.00	375.00
California personal income tax deficiency assessment for the years 1936, 1936 and 1937	4.14	1.89	2.25
Federal personal income tax deficiency assessment for year 1936	19.39	4.88	14.53
Total	\$2217.98	\$ 1103.98	\$ 1114.00
ITEM 15 - TAXES:			
San Diego County personal property	\$ 36.99	\$ 18.49	\$ 18.50
Baltimore real estate tax - 1936	597.37	298.68	298.69
1939	540.94	270.47	270.47
Stock transfer tax	106.31	53.16	53.15
California personal income tax			
1936	6.93	6.93	
1936	24.10	5.65	18.45
1937	.76	.38	.38
1938	15.20	7.60	7.60
Federal tax on club dues			
LaJolla Country Club	10.80	5.40	5.40
Guyanosa Club	7.20	3.60	3.60
LaJolla Beach & Tennis Club	3.60	1.80	1.80
Bankers Club	2.25	1.12	1.13
Federal admission tax on theater tickets	8.00	2.80	2.80
Automobile license plates	13.50	6.75	6.75
Total	\$1369.43	681.87	687.78
ITEM 16 - Other deductions authorized by law:			
Membership fee - Institute of Aeronautical Sciences	\$ 10.00	5.00	5.00



UNITED STATES NOT INVESTIGATED

INDIVIDUAL INCOME AND DEFENSE TAX RETURN 1940

Page 1

(Auditor's Stamp)

FOR GROSS INCOMES OF MORE THAN \$5,000 FROM SALARIES, WAGES,
DIVIDENDS, INTEREST, ANNUITIES, AND FOR INCOMES FROM
OTHER SOURCES REGARDLESS OF AMOUNTS

For Calendar Year 1940

(Do not use these spaces)

File Code **2942**

Serial No. **202467**

District **6-Calif**

(Cashier's Stamp)

REVIEWED
AUDIT REVIEW DIVISION

By: **H. Rosenblatt**

DATE **APR 10 1942**

or fiscal year beginning _____, 1940, and ended _____, 1941

To be filed with the Collector of Internal Revenue for your district not later than the 15th day of the third month following the close of your taxable year

PRINT NAME AND ADDRESS PLAINLY. (See Instructions C)

Ca. A. Van Dusen

(Name) (Use given names of both husband and wife, if this is a joint return)

2622 Polinettia Drive

(Street and number, or rural route)

San Diego

(Post office)

San Diego

(County)

California

(State)

RECEIVED
WITH REMITTANCE
MAR 13 1941
COLL. INT. REV.
LOS ANGELES

Income and Deductions

INCOME

1. Salary and other compensation for personal services. (From Schedule A)	\$ 22,422.00
2. Dividends	15,470.00
3. Interest on bank deposits, notes, mortgages, etc.	
4. Interest on corporation bonds	
5. Taxable interest on Government obligations, etc. (From Schedule B)	
6. Income (or loss) from partnerships, syndicates, pools, etc. (other than capital gains or losses). (Attach names and addresses)	
7. Income from subsidiaries. (Attach names and addresses)	
8. Rents and royalties. (From Schedule C)	
9. Income (or loss) from business or profession. (From Schedule D)	
10. (a) Net short-term gain from sale or exchange of capital assets. (From Schedule E)	
(b) Net long-term gain (or loss) from sale or exchange of capital assets. (From Schedule F)	212.81
(c) Net gain (or loss) from sale or exchange of property other than capital assets. (From Schedule G)	
11. Other income (including income from annuities). (State source)	
12. Total income in items 1 to 11. (Enter net taxable income in Schedule I)	\$ 40,430.81

DEDUCTIONS

13. Contributions paid. (Attach in Schedule H)	\$ 25.00
14. Interest. (Attach in Schedule H)	1,970.00
15. Taxes. (Attach in Schedule H)	840.81
16. Losses from fire, storm, shipwreck, or other casualty, or theft. (Attach in Schedule H)	
17. Bad debts. (Attach in Schedule H)	
18. Other deductions authorized by law. (Attach in Schedule H)	870.00
19. Total deductions in items 13 to 18	\$ 3,615.81
20. Net income (Item 12 minus item 19)	\$ 37,000.27

Remainder after transferring to COMPUTATION OF TAX of net income to wife

21. Net income (Item 20 above)	\$ 18,885.10
22. Less: Personal exemption. (From Schedule J-1)	\$ 800.00
23. Credit for dependents. (From Schedule J-2)	400.00
24. Balance (surplus net income)	\$ 17,685.10
25. Less: Income on Government obligations, etc. (See Instructions H)	
26. Earned income credit. (From Schedule K-1 or K-2)	1,121.18
27. Balance subject to normal tax	\$ 16,563.92
28. Normal tax (4% of item 27)	\$ 662.56
29. Surtax on item 24. (See Instructions J)	1,886.84
30. Total (Item 28 plus item 29)	\$ 2,549.40
31. Total income tax (Sum item 30, or if you had a net long-term capital gain or loss, enter item 30, Schedule F)	\$ 2,549.40
32. Less: Income tax paid at source	\$ 0.00
33. Income tax paid to a foreign country or U.S. possession. (Attach Form 1130)	
34. Balance of income tax (Sum item 31 minus item 32 and 33)	\$ 2,549.40
35. Defense tax (10% of item 31). (See Instructions)	254.94
36. Total income and defense taxes due (Sum item 34 plus item 35)	\$ 2,804.34

NOTE.—In order that this return may be accepted as meeting the requirements of the Internal Revenue Code, the data called for hereon must be set forth FULLY and CORRECTLY.

EX. C.

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6-1



Schedule A.—INCOME RECEIVED FROM OTHERS CONSISTING OF SALARIES, WAGES, FEES, COMMISSIONS, BONUSES, AND OTHER COMPENSATION FOR PERSONAL SERVICES. (See Instruction 1)

1. Name and address of employer (If a governmental unit, indicate whether "Federal," "State," or "Local")	2. Amount	3. Expenses (Amount)	4. Amount
See Schedule A attached.			

Total of column 2 minus total of column 4 (enter as item 1, page 1)

Schedule B.—INTEREST ON GOVERNMENT OBLIGATIONS, ETC. (See Instruction 2)

1. Obligations or securities	2. Amount owned at end of year (including your proportionate share of such obligations held by partners, agents, associates, or others (State below))	3. Interest received or accrued during the year	4. Amount of principal, interest, etc. which is exempt from taxation	5. Interest on amount in excess of exemption
(a) Obligations of a State, Territory, or political subdivision thereof, of the District of Columbia, or United States government			All	
(b) Obligations issued under Federal Farm Loan Act, or under such Act as amended			All	
(c) Obligations of United States issued on or before September 1, 1917—Treasury Notes, Treasury Bills, and Treasury Certificates of Indebtedness			All	
(d) United States Savings Bonds and Treasury Bonds			All	
(e) Obligations of instrumentalities of the United States (other than obligations to be reported in (b) above)			\$5,000	
Total (enter as item 1, page 1)			None	

Schedule C.—INCOME FROM RENTS AND ROYALTIES. (See Instruction 3)

1. Kind of property	2. Amount	3. Depreciation (explain in Schedule E)	4. Repairs (explain below)	5. Other expenses (explain below)	6. Net profit (column 2 minus sum of columns 3, 4, and 5) (enter as item 1, page 1)
See Schedule C Attached					

Schedule D.—PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION. (See Instruction 4)

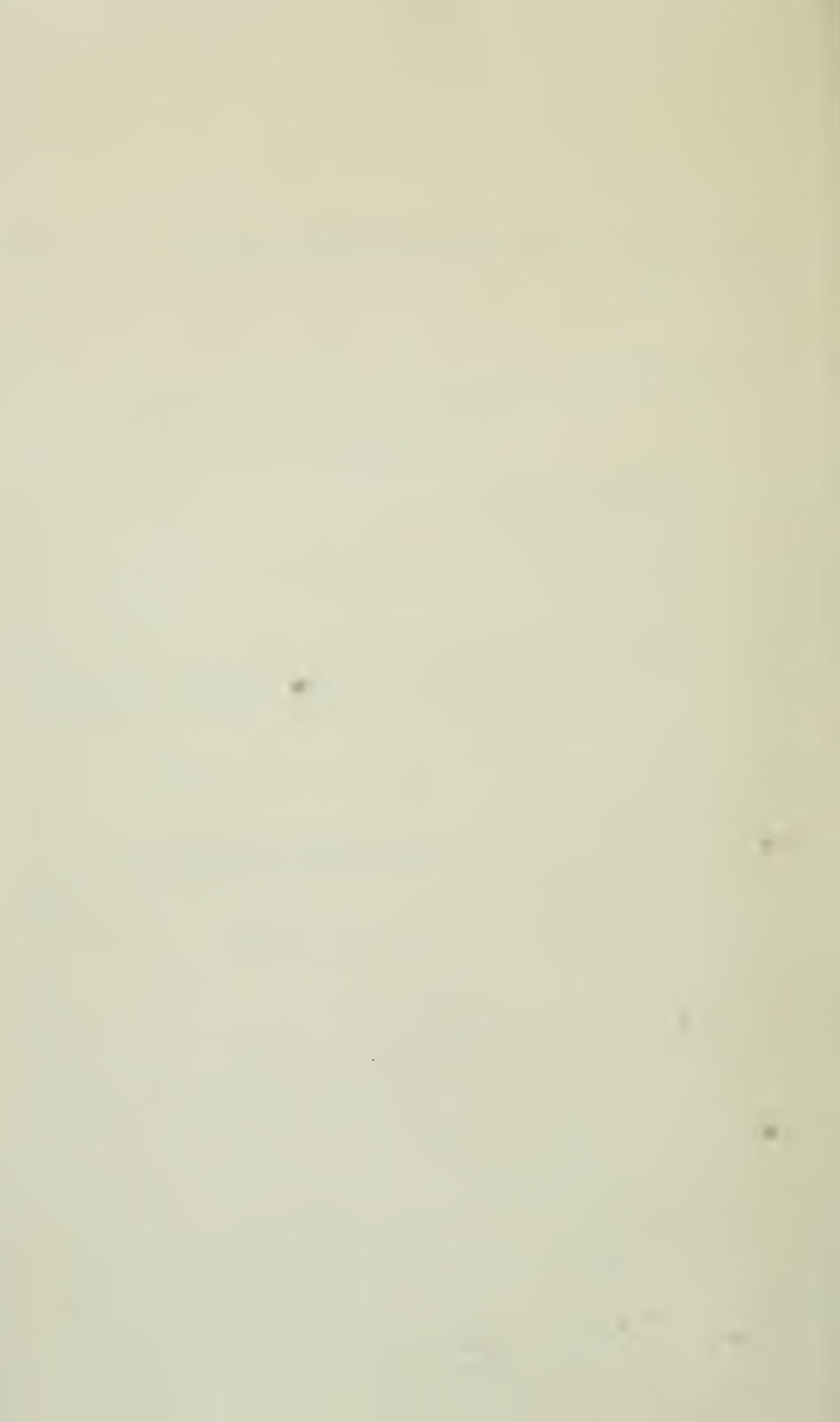
(1) nature of business and address of different firms, places and address on page 1. (2) number of places of business. (3) business name

COST OF GOODS SOLD		OTHER BUSINESS DEDUCTIONS	
(a) Inventory at beginning of year		11. Salaries and wages not included in "Labor" (do not deduct compensation for yourself)	
(b) Merchandise bought for sale		12. Interest on business indebtedness	
(c) Labor		13. Taxes on business and business property	
(d) Material and supplies		14. Losses (explain below)	
(e) Other costs (explain below)		15. Bad debts arising from sales or services	
Total of lines 2 to 6		16. Depreciation, depletion, and depletion (explain in Schedule E)	
Less inventory at end of year		17. Rent, repairs, and other expenses (explain below or on separate sheet)	
Net cost of goods sold (line 7 minus line 8)		18. Total of lines 11 to 17	
Cost of goods sold (line 7 minus line 8)		19. Net profit (or loss) (line 1 minus lines 9 and 18) (enter as item 9, page 1)	

If the production, manufacture, purchase, and sale of real estate is an incident to the carrying on of a business, inventories are required. Enter "C" or "M" on lines 2 and 8 to explain the deductions claimed in lines 9, 10, and 17.

Schedule E.—EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES C, D, F, AND G

1. Kind of property	2. Date acquired	3. Cost or other basis (Do not include land or other nondepreciable property)	4. Allowable depreciation in use at end of year	5. Depreciable (or allowable) for prior years	6. Remaining cost or other basis to be recovered	7. Estimated life when in commencing depreciation	8. Estimated percentage of life from beginning of year	9. Depreciation allowable this year
Building house at River Road								
Timore, Maryland	1930	\$2,500.00		\$2,125.00	21,575.00	20	14	1,425.00



Schedule F.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS. (See Instruction 10)

1. Kind of property (if necessary state character of depreciable assets not shown below)	2. Date acquired Mo. Day Year	3. Date sold Mo. Day Year	4. Gross sales price (contract price)	5. Cost or other basis	6. Expense of sale and cost of improvements subsequent to acquisition or March 1, 1913 (multiple in Schedule E)	7. Depreciation allowed (or allowable) since acquisition or March 1, 1913 (multiple in Schedule E)	8. Gain or loss (column 4 plus column 7 minus column 5 and 6)	9. Short capital gain or loss to be taken into account Mo. Day Year	10. Amount
SHORT-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD NOT MORE THAN 12 MONTHS									
			\$	\$	\$	\$			100.00
			\$	\$	\$	\$			100.00
			\$	\$	\$	\$			100.00
			\$	\$	\$	\$			100.00
Total net short-term capital gain or loss (enter in line 1, column 3, of summary below)									0.00
LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 12 MONTHS BUT NOT MORE THAN 24 MONTHS									
			\$	\$	\$	\$			66%
			\$	\$	\$	\$			66%
			\$	\$	\$	\$			66%
			\$	\$	\$	\$			66%
LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 24 MONTHS									
Baltimore Trust Co. 1763 1/2 St. N.W.	1/19/33	10/15/38	\$ 100.32	\$	\$	\$	100.32		50.16
Stock	1/19/33	10/15/38	15.20				28.20		17.60
"	1/28/33		8.50				8.50		4.15
"	12/2/33		283.80				283.80		141.90
(In litigation since 1933 - settled in 1940)									1 215.01
Total net long-term capital gain or loss (enter in line 2, column 3, of summary below)									0.00

SUMMARY OF CAPITAL NET GAINS OR LOSSES

1. Classification	2. Net short-term capital gain or loss (enter in column 3, of summary below)	3. Net gain or loss to be taken into account from column 10, above	4. Net gain or loss to be taken into account from particular assets (enter in column 3, of summary below)	5. Total net gain or loss to be taken into account (enter in column 3, of summary below)
		Gain	Loss	Gain
1. Total net short-term capital gain or loss (enter as item 10 (a), page 1, amount of gain shown in column 5)	\$	\$	\$	\$
2. Total net long-term capital gain or loss (enter as item 10 (b), page 1, amount of gain or loss shown in column 5)	\$	\$	\$	\$

COMPUTATION OF ALTERNATIVE TAX

Use only (1) If you had a net long-term capital gain, and item 14, page 1, exceeds \$22,000

(2) If you had a net long-term capital loss, and both line 14, page 1, exceeds \$22,000

1. Net income (item 20, page 1). (See Instruction 10).	\$ 18,603.10	10. Normal tax (4% of line 9)	\$ 744.12
2. (a) Net long-term capital gain (item 10 (b), page 1).	106.90	11. Surplus on line 6. (See Instruction 29).	1854.80
(b) Net long-term capital loss (item 10 (b), page 1).		12. Partial tax (line 10 plus line 11)	2008.28
3. Ordinary net income (line 1 minus line 2 (a) or line 1 plus line 2 (b)). (See Instruction 10).	\$ 18,610.00	13. (a) 30% of net long-term capital gain (30% of line 2 (a)).	32.07
4. Less: Personal exemption. (From Schedule 1-1)	\$ 800.00	(b) 30% of net long-term capital loss (30% of line 2 (b)).	
5. Credit for dependents. (From Schedule 1-2)	400.00	14. Alternative tax (line 12 plus line 13 (a) or line 12 minus line 13 (b)).	1972.20
6. Balance (surplus net income).	\$ 17,410.00	15. Total normal tax and surtax (from 10, page 1).	1981.84
7. Less: Interest on Government obligations, etc. (See Instruction 25).	\$	16. Tax liability (if a net long-term capital gain, use line 2 (a), enter line 14 or line 15, whichever is the lesser; if a net long-term capital loss, on line 2 (b), enter line 14 or line 15, whichever is the greater) (Enter as item 31, page 1).	1981.84
8. Earned income credit. (From Schedule K-1 or K-2). (See Inst. 10)	1121.13		
9. Balance subject to normal tax.	\$ 16,288.87		

Schedule G.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF PROPERTY OTHER THAN CAPITAL ASSETS (See Instruction 10)

1. Kind of property	2. Date acquired	3. Gross sales price (contract price)	4. Cost or other basis	5. Expense of sale and cost of improvements subsequent to acquisition or March 1, 1913	6. Depreciation allowed (or allowable) since acquisition or March 1, 1913 (multiple in Schedule E)	7. Gain or loss (column 3 plus column 6 minus column 4 and 5)
		\$	\$	\$	\$	\$
		\$	\$	\$	\$	\$
		\$	\$	\$	\$	\$
		\$	\$	\$	\$	\$
Total net gain (or loss) (enter as item 10 (c), page 1)						

State (in full, briefly, or by business relationship to you, if any, of purchase of any of the items on this page)

If any of such items were acquired by gift other than by purchase, explain fully how acquired



Schedule H.—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 13, 14, 15, 16, 17, AND 18

Page 4

1. Item No.	2. Explanation	3. Amount	1. Item No. (Continued)	2. Explanation (Continued)	3. Amount (Continued)
	See Schedule H Attached	\$			\$

Schedule I.—NONTAXABLE INCOME OTHER THAN INTEREST REPORTED IN SCHEDULE B. (See Instruction G)

1. Source of income	2. Nature of income	3. Amount
		\$

Schedule J.—EXPLANATION OF CREDITS CLAIMED IN ITEMS 22 AND 23. (See Instructions 22 and 23)

(1) Personal Exemption			(2) Credit for Dependents		
Status	Number of months during the year in such status	Credit claimed	Name of dependent and relationship	Number of months during the year Under 18 years old Over 18 years old	Credit claimed
Single, or married and not living with husband or wife		\$	Mrs. M. P. Van Dusen		\$
Married and living with husband or wife	12	800.00	Mother	12	400.00
Head of family (explain below)					
\$1,200 - balance of personal exemption claimed by wife, Wanda V. Van Dusen			Reason for support 85 years old, no other means if over 18 years old of support		

Schedule K.—COMPUTATION OF EARNED INCOME CREDIT. (See Instruction 25)

(1) If your net income is \$3,000 or less, use only this part of schedule		(2) If your net income is more than \$3,000, use only this part of schedule	
Net income (item 20, page 1)	\$	1 of salary \$22,422.80	\$ 11,211.25
Earned income credit (10% of net income, above)		Earned net income (not more than \$14,000)	18,508.10
		Net income (item 20, page 1)	
		Earned income credit (10% of earned net income or 10% of net income, above, whichever amount is smaller, but do not enter less than \$300)	1,121.18

QUESTIONS

1. State your principal occupation or profession Executive
2. Check whether you are a citizen ☒ or a resident alien ☐.
3. Did you file a return for any prior year? Yes. If so, what was the latest year? 1939. To which Collector's office was it sent? Los Angeles, California
4. Are items of income or deductions of both husband and wife included in this return? No
5. State (a) Name of husband or wife if separate return was made Wanda V. Van Dusen
- (b) Personal exemption, if any, claimed thereon \$1,200
- (c) Collector's office to which it was sent Los Angeles
6. Check whether this return was prepared on the cash ☒ or accrual ☐ basis.
7. Did you at any time during your taxable year own directly or indirectly any stock of a foreign corporation or a personal holding company as defined by section 501 of the Internal Revenue Code? (Answer "yes" or "no") No (If answer is "yes," attach statement required by Instruction J.)

AFFIDAVIT. (See Instruction E)

I/we swear (or affirm) that this return (including any accompanying schedules and statements) has been examined by me/us, and to the best of my/our knowledge and belief is a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Internal Revenue Code and the regulations issued under authority thereof.

Subscribed and sworn to by C. P. Van Dusen
before me this 12 day of March, 1941

John P. Van Dusen
Notary Public for California
A return made by an agent shall be accompanied by power of attorney. (See Instruction E.)

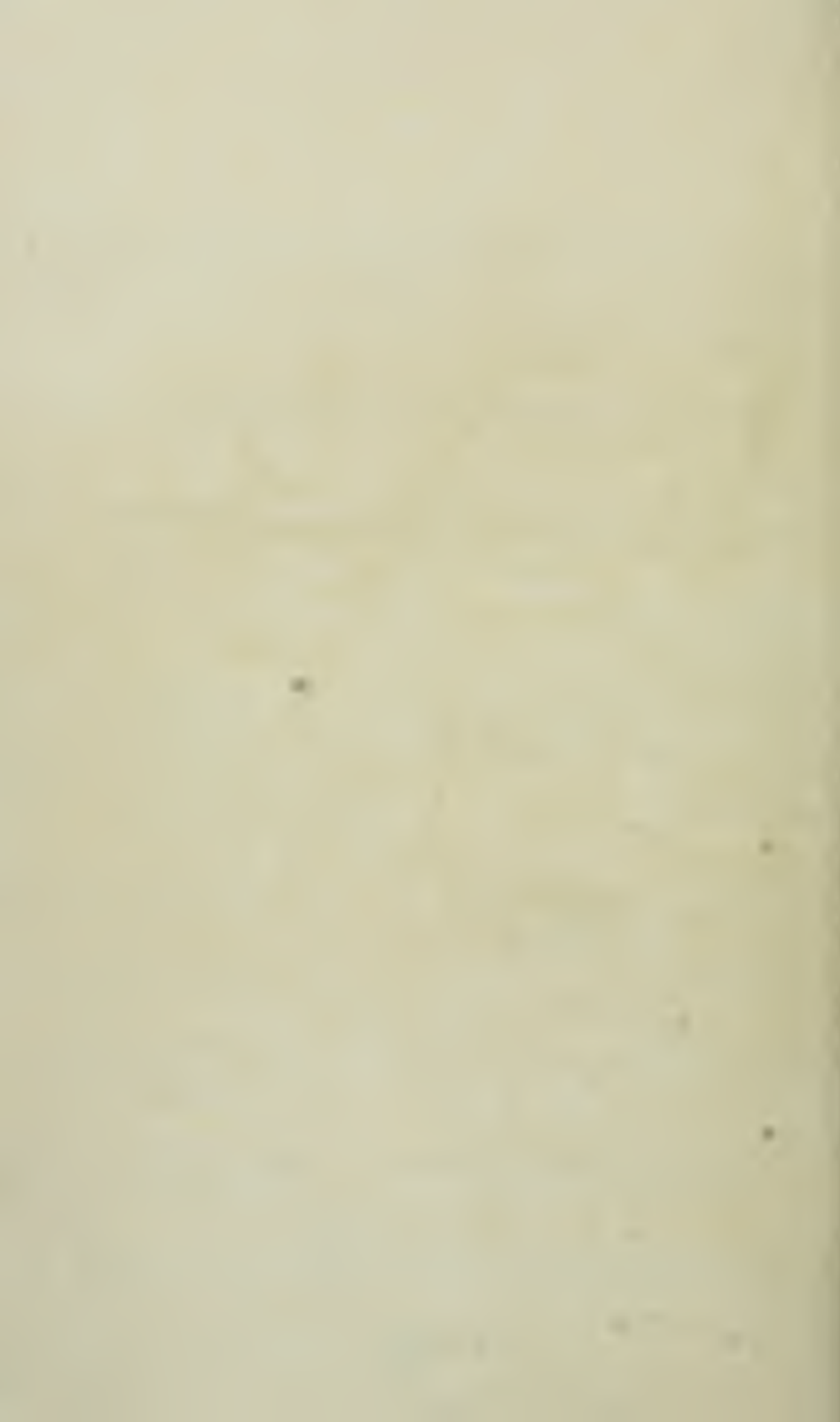
AFFIDAVIT. (See Instruction E)

(If this return was prepared for you by some other person, the following affidavit must be executed)

I/we swear (or affirm) that I/we prepared this return for the person or persons named herein and that the return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the tax liability of the person or persons for whom this return has been prepared of which I/we have any knowledge.

Subscribed and sworn to before me this _____ day
of _____, 1941.





CONSOLIDATED AIRCRAFT CORPORATION
LINDBERGH FIELD, SAN DIEGO, CALIF.

UNITED STATES
INDIVIDUAL INCOME TAX RETURN
FORM 1040
YEAR 1940

C. A. VAN DUSEN AND WANDA V. VAN DUSEN.
2668 POINSETTIA DRIVE, SAN DIEGO, CALIFORNIA

SCHEDULE A
EXPLANATION OF DEDUCTIONS AND INCOME CLAIMED
IN ITEM 1

ITEM 1 - INCOME:

Consolidated Aircraft Corp., Lindbergh Field, San Diego, Cal. - Gross Salary	\$22,442.50
Aero Industries Technical Inst. - Director's fee	10.00
	<u>\$22,452.50</u>
Less California Unemployment Insurance tax	30.00
	<u><u>\$22,422.50</u></u>

SCHEDULE C
EXPLANATION OF DEDUCTIONS AND INCOME CLAIMED
IN ITEM 8

ITEM 8 - RENTS AND ROYALTIES:

Northill, Inc. royalty on square shears	\$ 3,420.16	
Expenses: (Column 8)		
3 trips to Los Angeles at \$50 each -	\$150.00	
Square shear accounting service	100.00	
" " draftsman "	10.00	
	<u>260.00</u>	
		\$3,160.16
Rental from dwelling house at 107 Upper Road, Baltimore, Maryland	\$1,230.00	
Depreciation	\$1,425.00	
Repairs	74.25	
Maintenance tax	28.50	
Commission	66.00	
Legal fees	56.27	
	<u>1,648.00</u>	
		418.00
		<u>\$2,742.16</u>

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418.00

\$2,742.16

C-1



CONSOLIDATED AIRCRAFT CORPORATION
LINDBERGH FIELD, SAN DIEGO, CALIF.

UNITED STATES
INDIVIDUAL INCOME TAX RETURN
FORM 1040
YEAR 1940

C. A. VAN DUSEN AND WANDA V. VAN DUSEN,
2646 POINSETTIA DRIVE, SAN DIEGO, CALIFORNIA

SCHEDULE H
EXPLANATION OF DEDUCTIONS CLAIMED IN
ITEMS 13, 14, 15 and 16.

ITEM 13 - CONTRIBUTIONS:

San Diego Community Chest \$ 25.00

ITEM 14 - INTEREST:

Bank of America note \$1,220.00

Baltimore National Bank, mortgage on dwelling
house 780.00

\$1,970.00

ITEM 15 - TAXES:

San Diego County personal property \$ 40.32

Baltimore real estate tax 573.03

New York personal income tax deficiency
assessment for 1938 76.51

California personal income tax for 1939:

Wanda V. Van Dusen \$ 51.91

C. A. Van Dusen 52.12

104.03

Federal tax on club dues:

LaJolla Country Club 10.80

Cuyamaca Club 7.20

LaJolla Beach & Tennis Club 3.80

Bankers Club of America 2.25

Federal Admission tax on theater tickets 5.00

Automobile license plates \$ 13.15

13.72

26.87

\$ 849.61

ITEM 16 - OTHER DEDUCTIONS AUTHORIZED BY LAW:

Membership fee - Inst. of Aeronautical Sciences \$ 10.00

Legal fees in connection with defense of double
liability on Baltimore Trust Company stock 500.05

\$ 570.05



UNITED STATES INDIVIDUAL INCOME TAX RETURN

Page 1
1941

(Auditor's Stamp)

OPTIONAL FORM 1040A MAY BE FILED INSTEAD OF THIS FORM IF GROSS INCOME IS NOT MORE THAN CLASS AND CONSISTS WHOLLY OF SALARIES, WAGES, OTHER COMPENSATION FOR PERSONAL SERVICES, DIVIDENDS, INTEREST, RENT, ANNUITIES, OR ROYALTIES.

For Calendar Year 1941

or fiscal year beginning 1941, and ending 1942

To be filed with the Collector of Internal Revenue for your district not later than the 15th day of the third month following the close of your taxable year

PRINT NAME AND ADDRESS PLAINLY. (See Instructions C)

Ca. Mrs. Van Dusen

(Name) (Use given names of both husband and wife, if this is a joint return)

2668 Poinsettia Drive

(Street and number, or rural route)

San Diego,

San Diego,

California

(Post office)

(County)

(State)

(Do not use these spaces)

File No. 2942
Serial 518186

District 8-Calif
(Cashier's Stamp)

MAR 16 1942

COLL INT REV.
LOS ANGELES CAL.

Cash Check

Post Payment

Item and
Instruction No.

INCOME

Amount

Deductible Expenses
(Amounts from and attached)

1. Salaries and other compensation for personal services, \$ 32,584.37 \$ 32,584.37
2. Dividends 52,874.60
3. Interest on (a) bank deposits, notes, etc., \$ _____; (b) corporation bonds, \$ _____
4. Interest on Government obligations, etc.:
(a) Federal (A) Schedule A, \$ _____; (b) from line (1), Schedule A, \$ _____
5. Rents and royalties. (From Schedule B) 675.67
6. Annuities _____
7. (a) Net short-term gain from sale or exchange of capital assets. (From Schedule F) _____
(b) Net long-term gain (or loss) from sale or exchange of capital assets. (From Schedule F) 21,027.70
(c) Net gain (or loss) from sale or exchange of property other than capital assets. (From Schedule G) _____
8. Net profit (or loss) from business or profession. (From Schedule H) _____
(State total receipts, from line 1, Schedule H, \$ _____)
9. Income (or loss) from partnerships; fiduciary income; and other income. (From Schedule D) _____
10. Total income in items 1 to 9. \$ 112,130.54

ITEMS 7, 8, AND 9 ABOVE (AND PAGES 3 AND 4) NEED NOT BE CONSIDERED UNLESS YOU HAVE INCOME (OR LOSSES) IN ADDITION TO ITEMS ABOVE.

DEDUCTIONS

11. Contributions paid. (Explain in Schedule C) \$ 265.00
12. Interest. (Explain in Schedule C) 1,259.45
13. Taxes. (Explain in Schedule C) 1,671.80
14. Losses from fire, storm, shipwreck, or other casualty, or theft. (Explain in Schedule C) _____
15. Bad debts. (Explain in Schedule C) _____
16. Other deductions authorized by law. (Explain in Schedule C) 10.00
17. Total deductions in items 11 to 16. \$ 3,206.25

18. Net income (item 10 minus item 17) Remainder after transferring 1/2 of net \$ 115,924.09

Income to COMPUTATION OF TAX wife, Wanda V. Van Dusen \$ 57,962.06

- | | |
|--|--|
| 19. Net income (item 18 above) <u>\$ 57,962.06</u> | 26. Normal tax (4% of item 25) <u>\$ 2,222.48</u> |
| 20. Less: Personal exemption. (From Schedule D-1) <u>\$ 600.00</u> | 27. Surtax on item 22. (See Instructions 27) <u>\$ 25,342.32</u> |
| 21. Credit for dependents. (From Schedule D-2) <u>400.00</u> <u>1,000.00</u> | 28. Total (item 26 plus item 27) <u>\$ 26,570.64</u> |
| 22. Balance (surtax net income) <u>\$ 56,962.06</u> | 29. Total tax (item 28 or line 16, Schedule F) <u>\$ 22,382.60</u> |
| 23. Less: Item 4 (e) above \$ _____ | 30. Less: Income tax paid at SOURCE \$ _____ |
| 24. Earned income credit. (From Schedule E-1 or E-2) <u>1,400.00</u> <u>1,400.00</u> | 31. Income tax paid to a foreign country or U.S. possession. (Amount from 114) _____ |
| 25. Balance subject to normal tax <u>\$ 55,562.06</u> | 32. Balance of tax (item 29 minus items 30 and 31) <u>\$ 22,382.60</u> |

I/we swear (or affirm) that this return (including any accompanying schedules and statements) has been examined and to the best of my/our knowledge and belief is a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Internal Revenue Code and the regulations issued under authority thereof.

Subscribed and sworn to by Ca. Mrs. Van Dusen (Signature) (See Instructions E)

before me this 14 day of March 1942

James H. Hagan (Signature)
(Notary Public and State of California)

A return made by an agent must be accompanied by power of attorney. (See Instructions E)

IF THIS RETURN WAS PREPARED FOR YOU BY SOME OTHER PERSON, THE AFFIDAVIT ON PAGE 4 MUST BE EXECUTED

My Commission Expires Aug. 7, 1943.

EX. D.

10-5555

P-1



Schedule A.—INTEREST ON GOVERNMENT OBLIGATIONS, ETC. (See Instruction C)

Page 2

1. Obligations or securities	2. Amount owned at end of year including year of preparation share of such obligations held by estates, trusts, partnerships, or common trust funds	3. Interest received or accrued during the year	4. Amount of principal, interest on which is exempt from taxation	5. Interest on amount in excess of exemptions, and dividends subject to taxation only
(a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions			All	XXXXXXXXXX
(b) Obligations issued prior to March 1, 1941, under Federal Farm Loan Act, or under such Act as amended			All	XXXXXXXXXX
(c) Obligations of United States issued on or before September 1, 1917			All	XXXXXXXXXX
(d) Treasury Notes, Treasury Bills, and Treasury Certificates of Indebtedness issued prior to March 1, 1941			All	XXXXXXXXXX
(e) United States Savings Bonds and Treasury Bonds issued prior to March 1, 1941			\$5,000	\$.....
(f) Obligations of instrumentalities of the United States (other than obligations to be reported in (b) above) issued prior to March 1, 1941			None	
(g) Dividends on share accounts in Federal savings and loan associations				XXXXXX
(h) Total (enter as item 4 (e), page 1)				\$.....
(i) Obligations issued on or after March 1, 1941, by the United States or any agency or instrumentality thereof (enter amount of interest as item 4 (i), page 1)		Amount owned at end of year		Interest received or accrued during the year (subject to normal tax and excess)

Schedule B.—INCOME FROM RENTS AND ROYALTIES. (See Instruction 5)

1. Kind of property	2. Amount	3. Depreciation or depletion (attach schedule)	4. Repairs (explain below)	5. Other expenses (explain below)	6. Net profit (columns 2 minus sum of columns 3, 4, and 5) (enter on line 5, page 1)
See Schedule B attached.	\$.....	\$.....	\$.....	\$.....	\$.....

Explanation of deductions claimed in columns 4 and 5.

Schedule C.—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 11, 12, 13, 14, 15, AND 16

1. Item No.	2. Explanation	3. Amount	1. Item No. (Continued)	2. Explanation (Continued)	3. Amount (Continued)
See Schedule C attached.		\$.....			\$.....

Schedule D.—EXPLANATION OF CREDITS CLAIMED IN ITEMS 20 AND 21. (See Instructions 20 and 21)

(1) Personal Exemption			(2) Credits for Dependents		
Status	Number of months during the year in such status	Credit claimed	Name of dependent and relationship	Number of months during the year Under 18 years old 18 years or over	Credit claimed
Single, or married and not living with husband or wife, and not head of family		\$.....	Mrs. M. F. Van Dusen	12	\$.....
Married and living with husband or wife	12	600.00	Mother	12	400.00
Head of family (explain below)					
\$900.00 balance of personal exemption claimed by wife, Wanda Y. Van Dusen.			Reason for support if 18 years or over: 86 years old - no other means of support.		

Schedule E.—COMPUTATION OF EARNED INCOME CREDIT. (See Instruction 24)

(a) If your net income is \$9,000 or less, use only this part of schedule	(b) If your net income is more than \$9,000, use only this part of schedule
Net income (Item 14, page 1)	Earned net income (not more than \$14,000)
Earned income credit (10% of net income, above)	Net income (Item 14, page 1)
	Earned income credit (10% of earned net income or 10% of net income, above, whichever amount is smaller, but do not enter less than \$300)
\$.....	\$.....

QUESTIONS

- State your principal occupation or profession Executive
- Name and address of employer None at present.
- Did you file a return for any prior year? Yes. If so, what was the latest year? 1940. To which Collector's office was it sent? Los Angeles, Calif.
- If separate returns were made for the current year, state:
 - Name of husband or wife Wanda Y. Van Dusen
 - Personal exemption, if any, claimed \$900.00
 - Collector's office to which it was sent Los Angeles, Cal.
- Check whether this return was prepared on the cash ☒ or accrual ☐ basis.
- Return on each basis, do you elect, under section 41, to include on income received in the current year the increase for current and prior years in the redemption price of noninterest-bearing obligations issued at a discount? No. If so, attach statement listing obligations owned and computation of the accrued income. Report such income on interest in Item 3 or 4, page 1, whichever applicable.
- Did you receive during the taxable year any substantial income other than interest reported in Schedule A (see Instruction G)? No. If so, attach schedule showing source, nature, and amount of such income.
- Did you at any time during your taxable year own directly or indirectly any stock of a foreign corporation or a personal holding company as defined by section 301 of the Internal Revenue Code? No. If so, attach statement required by Instruction J.

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DETACH PAGES 3 AND 4 IF NOT USED

Page 3

Schedule F.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS. (See Instruction 7)

1. Kind of property (if necessary, attach statement of descriptive details not shown below)	2. Date acquired Mo. Day Year	3. Date sold Mo. Day Year	4. Gross sales price (contract price)	5. Cost or other basis	6. Expenses of sale and cost of improvements subsequent to acquisition or March 1, 1913 (include in Schedule D)	7. Depreciation allowed (or allowable) (see instructions or March 1, 1913 (include in Schedule D))	8. Gain or loss (column 4 plus column 6 minus the sum of columns 5 and 7)	9. Percentage	10. Amount
SHORT-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD NOT MORE THAN 18 MONTHS									
			\$	\$	\$	\$	\$	100	\$
								100	
								100	
								100	
Total net short-term capital gain or loss (enter in line 1, column 3, of summary below)									\$

LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 18 MONTHS BUT NOT FOR MORE THAN 24 MONTHS

1. Kind of property (if necessary, attach statement of descriptive details not shown below)	2. Date acquired Mo. Day Year	3. Date sold Mo. Day Year	4. Gross sales price (contract price)	5. Cost or other basis	6. Expenses of sale and cost of improvements subsequent to acquisition or March 1, 1913 (include in Schedule D)	7. Depreciation allowed (or allowable) (see instructions or March 1, 1913 (include in Schedule D))	8. Gain or loss (column 4 plus column 6 minus the sum of columns 5 and 7)	9. Percentage	10. Amount
			\$	\$	\$	\$	\$	66%	\$
								66%	
								66%	
								66%	

LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 24 MONTHS

1. Kind of property (if necessary, attach statement of descriptive details not shown below)	2. Date acquired Mo. Day Year	3. Date sold Mo. Day Year	4. Gross sales price (contract price)	5. Cost or other basis	6. Expenses of sale and cost of improvements subsequent to acquisition or March 1, 1913 (include in Schedule D)	7. Depreciation allowed (or allowable) (see instructions or March 1, 1913 (include in Schedule D))	8. Gain or loss (column 4 plus column 6 minus the sum of columns 5 and 7)	9. Percentage	10. Amount
			\$	\$	\$	\$	\$	30	\$
								30	
								30	
								30	
Total net long-term capital gain or loss (enter in line 2, column 3, of summary below)									\$

SUMMARY OF NET CAPITAL GAINS OR LOSSES

1. Classification	2. Net short-term capital gain or loss of preceding taxable year (net of net income for such year)	3. Net gain or loss to be taken into account from column 8, above		4. Net gain or loss to be taken into account from partnerships and common trust funds		5. Total net gain or loss to be taken into account in columns 3, 4, and 5 of this summary		10. Total net capital gain or loss (enter in line 1, column 3, of summary below)
		Gain	Loss	Gain	Loss	Gain	Loss	
1. Total net short-term capital gain or loss (enter as item 7 (a), page 1, amount of gain shown in column 5)	\$	\$	\$	\$	\$	\$	\$	
2. Total net long-term capital gain or loss (enter as item 7 (b), page 1, amount of gain or loss shown in column 5)	\$21,027.70					\$21,027.70		

COMPUTATION OF ALTERNATIVE TAX

Use only: If you had a net long-term capital gain, and item 22, page 1, exceeds \$12,000, or
If you had a net long-term capital loss, and such loss plus item 22, page 1, exceeds \$12,000

1. Net income (Item 18, page 1). (See Instruction 7)	\$ 57,862.05	10. Normal tax (4% of line 9)	\$ 2,314.88
2. (a) Net long-term capital gain (Item 7 (b), page 1)	\$ 10,518.85	11. Surtax on line 6. (See Instruction 27)	\$ 17,426.81
(b) Net long-term capital loss (Item 7 (b), page 1)		12. Partial tax (line 10 plus line 11)	\$ 19,741.69
3. Ordinary net income (line 1 minus line 2 (a) or line 1 plus line 2 (b)). (See Instruction 7)	\$ 47,343.20	13. (a) 30% of net long-term capital gain (30% of line 2 (a))	\$ 3,155.66
4. Less: Personal exemption. (From Schedule D-1)	\$ 600.00	(b) 30% of net long-term capital loss (30% of line 2 (b))	
5. Credit for dependents. (From Schedule D-2)	\$ 400.00	14. Alternative tax (line 12 plus line 13 (a) or line 12 minus line 13 (b))	\$ 22,897.35
6. Balance (net tax not income)	\$ 46,443.20	15. Total normal tax and surtax (Item 28, page 1)	\$ 25,570.84
7. Less: Item 4 (a), page 1	\$ -	16. Tax liability (if a net long-term capital gain, on line 2 (a), enter line 14 or line 15, whichever is the lesser; if a net long-term capital loss, on line 2 (b), enter line 14 or line 15, whichever is the greater. (Enter on line 28, page 1)	\$ 22,897.35
8. Earned income credit. (From Schedule E-1 or E-2. (See last 7))	\$ 1,400.00		
9. Balance subject to normal tax	\$ 45,043.20		

Schedule G.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF PROPERTY OTHER THAN CAPITAL ASSETS (See Instruction 7)

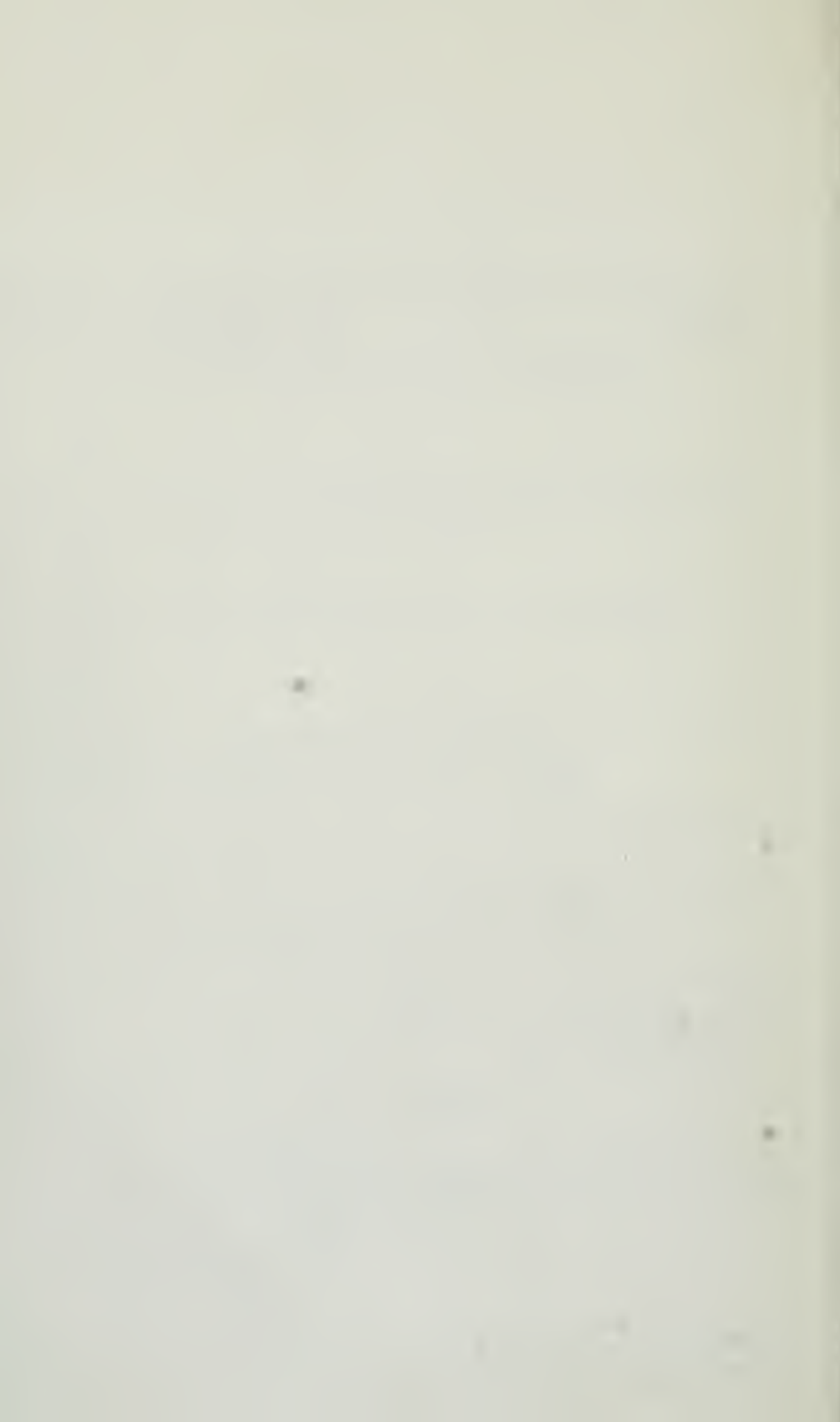
1. Kind of property	2. Date acquired	3. Gross sales price (contract price)	4. Cost or other basis	5. Expenses of sale and cost of improvements subsequent to acquisition or March 1, 1913	6. Depreciation allowed (or allowable) (see instructions or March 1, 1913 (include in Schedule D))	7. Gain or loss (column 3 plus column 5 minus the sum of columns 4 and 6)
		\$	\$	\$	\$	\$
Total net gain (or loss) (enter as item 7 (c), page 1)						

State the family, fiduciary, or business relationship to you, if any, of purchaser of any of the items on this page

If any of such items were acquired by you other than by purchase, explain fully how acquired

10-5555

* Remaining half net long-term capital gain claimed by wife, Wendie V. Van Dusen



Schedule H.—PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION. (See Instruction 8)

(State (1) nature of business (2) number of places of business (3) business name and address if different from name and address on page 1.)

1. Total receipts.....

COST OF GOODS SOLD

(To be used where inventories are an income-determining factor)

2. Inventory at beginning of year..... \$.....
 3. Merchandise bought for sale.....
 4. Labor.....
 5. Material and supplies.....
 6. Other costs (itemize below).....
 7. Total of lines 2 to 6..... \$.....
 8. Less inventory at end of year.....
 9. Net cost of goods sold (line 7 minus line 8)..... \$.....
 10. Gross profit (line 1 minus line 9)..... \$.....

OTHER BUSINESS DEDUCTIONS

11. Salaries and wages not included as "Labor" (do not deduct compensation for yourself)..... \$.....
 12. Interest on business indebtedness.....
 13. Taxes on business and business property.....
 14. Losses (explain below).....
 15. Bad debts arising from sales or services.....
 16. Depreciation, obsolescence, and depletion (explain in Schedule J).....
 17. Rent, repairs, and other expenses (itemize below or on separate sheet).....
 18. Total of lines 11 to 17..... \$.....
 19. Total of lines 9 and 18..... \$.....
 20. Net profit (or loss) (line 1 minus line 19) (enter as item 8, page 1)..... \$.....

If the production, manufacture, purchase, or sale of merchandise is an income-producing factor, inventories are required. Enter "C" or "C or M" on lines 2 and 8 to indicate whether inventories are valued at cost, or cost or market, whichever is lower.
 Explanation of deductions claimed in lines 6, 14, and 17.....

Schedule I.—INCOME FROM PARTNERSHIPS, FIDUCIARIES, AND OTHER SOURCES

INCOME (OR LOSS) FROM PARTNERSHIPS, SYNDICATES, ETC. (SEE INSTRUCTIONS 9 AND 10) (FURNISH NAMES AND ADDRESSES)

INCOME FROM FIDUCIARIES (FURNISH NAMES AND ADDRESSES)

INCOME FROM OTHER SOURCES (STATE NATURE)

Total amounts in Schedule I. (Enter as item 9, page 1).....

Schedule J.—EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES F, G, AND H

1. Kind of property (If buildings, state material of which constructed)	2. Date acquired	3. Cost or other basis (Do not include land or other nondepreciable property)	4. Assets fully depreciated by use at end of year	5. Depreciation allowed (for schedule) in prior years	6. Remaining cost or other basis to be recovered	7. Estimated life used in computing depreciation	8. Estimated life from beginning of year	9. Depreciation allowable this year
		\$.....	\$.....	\$.....	\$.....			\$.....

AFFIDAVIT. (See Instruction 12)

(If this return was prepared for you by some other person, the following affidavit must be executed)

I/we swear (or affirm) that I/we prepared this return for the person or persons named herein and that the return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the tax liability of the person or persons for whom this return has been prepared of which I/we have any knowledge.

Subscribed and sworn to before me this _____ day
 of _____, 194_____

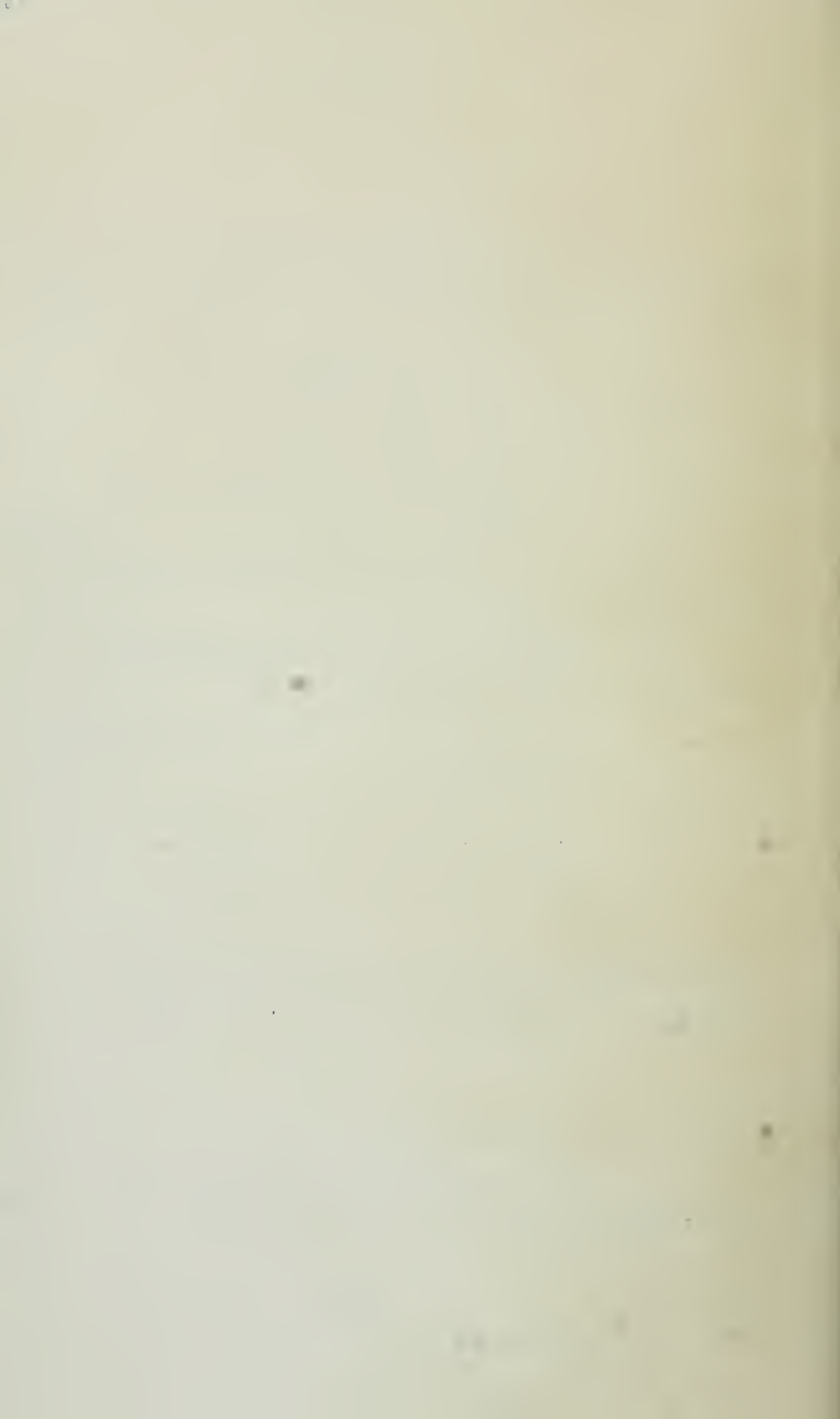


(Signature of person preparing the return)

(Signature of person preparing the return)

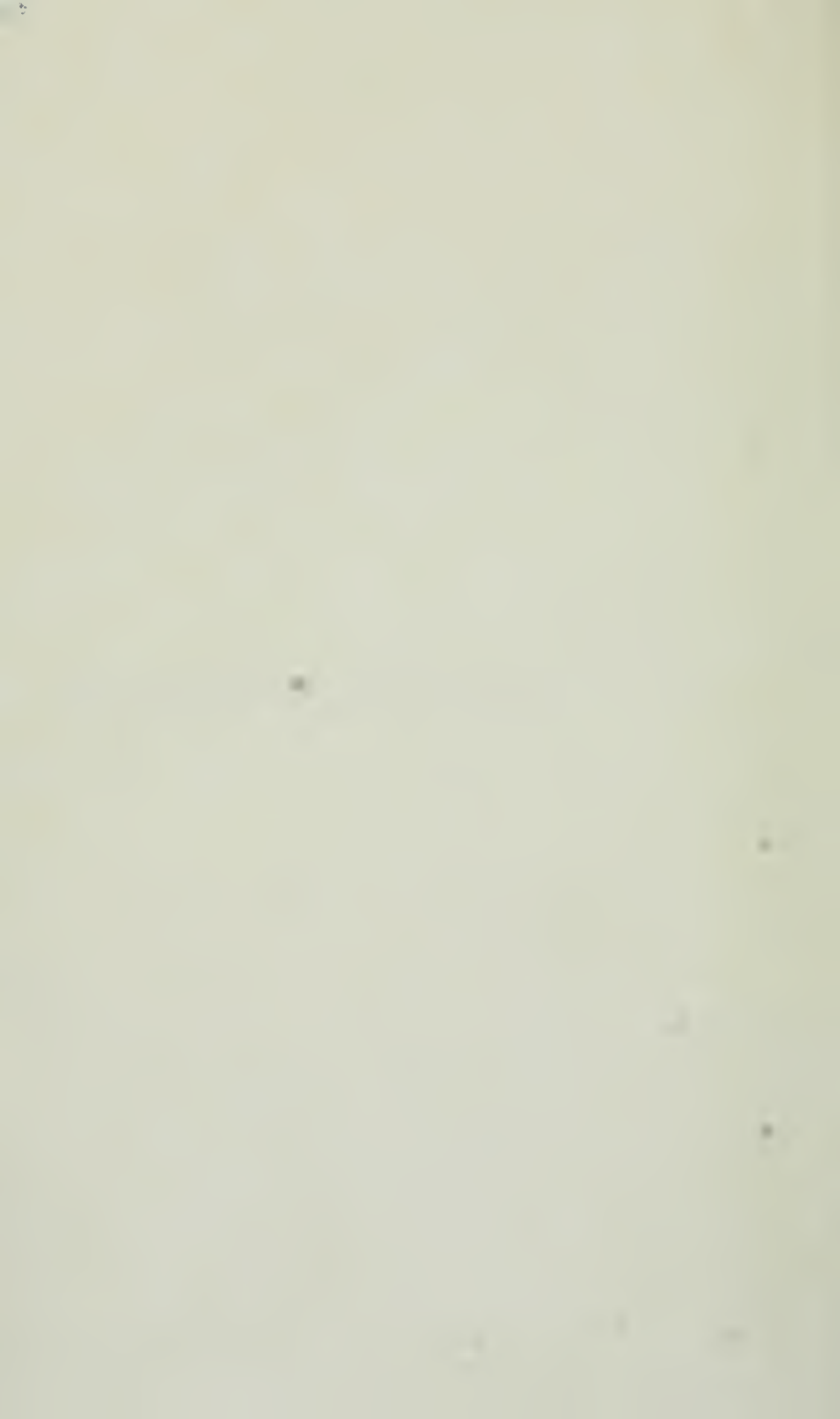
(Name of firm or company, if any)

(Signature and title of officer administering oath)



LONG-TERM CAPITAL GAINS AND LOSSES - ASSETS HELD FOR MORE THAN 24 MONTHS

Kind of property	2. Date acquired	3. Date sold	4. Gross sales price (contrast price)	5. Cost or other basis	8. Gain or loss	9. Per- cent- age	10. Amount
0 shs. Consolidated Aircraft Corp. Common Stock	3/ 3/39	7/ 3/41	\$30,173.79 ✓	\$ 5,000.00	\$25,173.79	50	\$12,586.88
0 shs. Same	5/29/35	7/ 3/41	30,361.22 ✓	20,703.15 ✓	9,658.07	50	4,829.04
0 shs. Same	7/ 1/35	"					
0 shs. Same	2/ 2/37	"					
0 shs. Same	3/ 9/37	12/22/41	8,223.56	1,000.00	7,223.56	50	3,611.78
0 shs. Same	4/30/37	"					
Total net long-term capital gain or loss					\$42,055.42		\$21,027.70



UNITED STATES
INDIVIDUAL INCOME TAX RETURN
FORM 1040
YEAR 1941

C. A. VAN DUSEN AND WANDA V. VAN DUSEN,
2668 POINSETTIA DRIVE, SAN DIEGO, CALIFORNIA

SCHEDULE A
EXPLANATION OF DEDUCTIONS AND INCOME CLAIMED
IN ITEM 1

ITEM 1 - INCOME:

Consolidated Aircraft Corp., Lindbergh Field, San Diego, Cal. - Gross Salary	\$ 31,255.00
Hirsch, Lilienthal & Company - Consulting Services (Finder's Fee - Rohr Aircraft Corp., San Diego, California)	8,319.37
Aero Industries Technical Inst. - Director's fee	10.00
	\$ 39,584.37
Less California Unemployment Insurance tax	30.00
	<u>\$ 39,554.37</u>

SCHEDULE B
EXPLANATION OF DEDUCTIONS AND INCOME CLAIMED
IN ITEM 5

ITEM 5 - RENTS AND ROYALTIES:

Northill, Inc. royalty on square shears	\$ 4,961.92
Expenses (Column 5)	
3 trips to Los Angeles at \$50 each - \$150.00	
Square shear accounting service 100.00	
	<u>250.00</u>
	\$ 4,711.92
Rental from dwelling house at 107 Upnor Road, Baltimore, Maryland	\$ 1,455.00
Depreciation	\$1,425.00
Repairs	14.25
Maintenance tax	26.50
Legal fees	27.50
	<u>\$ 1,493.25</u>

LOSS

38.25

\$ 4,673.67

EXPLANATION OF DEPRECIATION
COLUMN 3 OF SCHEDULE B

1. Kind of property	2. Date acquired	3. Cost	4. Depreciation allowed prior yrs.	5. Remaining cost	6. Estd. Life	7. Estd. Rem. Life
Dwelling house at 107 Upnor Rd. Baltimore, Maryland	1930	\$28,500.00	\$8,550.00	\$19,950.00	20	13
8. Depreciation allowable this year						
		\$1,425.00				



UNITED STATES
INDIVIDUAL INCOME TAX RETURN
FORM 1040
YEAR 1941

C. A. VAN DUSEN AND WANDA V. VAN DUSEN,
2668 POINSETTIA DRIVE, SAN DIEGO, CALIFORNIA

SCHEDULE C
EXPLANATION OF DEDUCTIONS CLAIMED IN
ITEMS 11, 12, 13, and 16.

ITEM 11 - CONTRIBUTIONS:

San Diego Community Chest	\$ 250.00	
British War Relief	15.00	
		\$ 265.00

ITEM 12 - INTEREST:

Bank of America note	\$ 509.45	
Baltimore National Bank, mortgage on dwelling house	750.00	
		1,259.45

ITEM 13 - TAXES:

San Diego County Personal Property Tax	\$ 73.77	
San Diego Light Post Tax	2.56	
San Diego County taxes on property at 2668 Poinsettia Drive, San Diego, Calif.	369.25	
Real property tax on property at 107 Upnor Road, Baltimore, Maryland	494.30	
California personal income tax - 1940:		
Wanda V. Van Dusen	\$310.07	
C. A. Van Dusen	310.07	
		620.14
Federal tax on club dues:		
LaJolla Country Club	\$ 8.24	
Cuyamaca Club	7.92	
La Jolla Beach & Tennis Club	5.94	
Bankers Club of America	2.25	
		24.35
Federal Admission tax on amusement tickets	5.00	
Automobile license plates (4 cars)	70.23	
Transfer tax on sale of securities	12.20	
		1,671.80

ITEM 16 - OTHER DEDUCTIONS AUTHORIZED BY LAW:

Membership fee - Inst. of Aeronautical Sciences		10.00
		\$3,206.25



Treasury Department

FORM 1040

Internal Revenue Service

Page 1

1938 UNITED STATES INDIVIDUAL INCOME TAX RETURN 1938

FOR NET INCOMES OF MORE THAN \$5,000 FROM SALARIES, WAGES, DIVIDENDS, INTEREST, ANNUITIES, AND FOR INCOMES FROM OTHER SOURCES REGARDLESS OF AMOUNTS

For Calendar Year 1938

or fiscal year beginning _____, 1938, and ended _____, 1938

(Before Preparing This Return, Read the Instructions Carefully)

To be filed with the Collector of Internal Revenue for your district not later than the 15th day of the third month following the close of your taxable year

PRINT NAME AND ADDRESS PLAINLY (See Instruction E)

Frank V. Van Dusen
 828 Anayllis Drive
 San Diego, California

(Do not use these spaces)

FILED 9/4/41

February 20 1940

DATE

RECEIVED

WITH REMITTANCE

JAN 31 1940

COLL. INT. RSV

LOS ANGELES, CAL.

DATE

FILED

INCOME

1. Salaries and other compensation for personal services. (From Schedule A)
2. Dividends
3. Interest on bank deposits, bonds, mortgages, etc.
4. Interest on corporate bonds
5. Taxable interest on Government obligations
6. Income (or loss) from partnerships, syndicates, pools, etc. (Other than capital gains or losses).

7. Income from salaries. (Provide names and addresses)

8. Rents and royalties. (From Schedule C)

9. Income (or loss) from business or profession. (From Schedule D)

10. (a) Net short-term gain from sale or exchange of capital assets. (From Schedule F)

(b) Net long-term gain (or loss) from sale or exchange of capital assets. (From Schedule F)

(c) Net gain (or loss) from sale or exchange of property other than capital assets. (From Schedule G)

11. Other income (including income from annuities). (See instructions on capital gains and losses)

12. Total income in items 1 to 11. **\$ 5,555.00**

DEDUCTIONS

13. Contributions paid. (Schedule to Schedule 10)

14. Interest. (Schedule to Schedule 10)

15. Taxes. (Schedule to Schedule 10)

16. Losses from fire, storm, shipwreck, or other casualty, or theft. (Schedule to Schedule 10)

17. Bad debts. (Schedule to Schedule 10)

18. Other deductions authorized by law. (Schedule to Schedule 10)

19. Total deductions in items 13 to 18

20. Net income (from 12 minus item 19)

COMPUTATION OF TAX

21. Net income (from 20 above)	\$ 4,157.81	26. Normal tax (4% of item 21)	\$ 92.21
22. Less: Personal exemption.		27. Surtax on item 24. (See instructions)	
23. Credit for dependents.	\$ 4.40 00	28. Total (from 26 plus item 27)	\$ 92.21
24. Balance (surtax net income).	\$ 2,707.81	29. Total tax (from 28, after taking into account capital gain or loss, enter line 16, Schedule F)	\$ 92.21
25. Less: Income on Government obligations, etc. (See instructions)		30. Less: Income tax paid at source.	
26. Earned income credit.	\$ 401.95	31. Income tax paid to a foreign country (Form 1140)	
27. Balance subject to normal tax.	\$ 2,306.86	32. Balance of tax (from 29 minus items 30 and 31)	\$ 92.21

NOTE—Our form marked "DUPLICATE COPY" must be filed with this original return (It will be assessed if duplicate copy is not filed)

F X E

E-1



Page 2

Schedule A.—INCOME RECEIVED FROM OTHERS CONSISTING OF SALARIES, WAGES, FEES, AND OTHER COMPENSATION FOR PERSONAL SERVICES. (See instruction 1)

1. Name and address of employer and nature of income	2. Amount	3. Expenses (deduct)	4. Amount
	\$		\$
Total of column 2 minus total of column 4 (enter as item 1, page 1)			\$

Schedule B.—INTEREST ON GOVERNMENT OBLIGATIONS, ETC. (See instruction 5)

1. Obligations or securities	2. Amount earned at end of year including your proportionate share of such obligations held by estates, trusts, partnerships, or common trust funds	3. Interest received or earned during the year	4. Interest exempt from taxation	5. Interest on amount in excess of exemption
U.S. Savings Bonds and Treasury Bonds	\$	\$	All	*****
U.S. Savings Bonds and Treasury Bonds	\$	\$	All	*****
U.S. Savings Bonds and Treasury Bonds	\$	\$	All	*****
U.S. Savings Bonds and Treasury Bonds	\$	\$	All	*****
U.S. Savings Bonds and Treasury Bonds	\$	\$	None	*****
Total (enter as item 5, page 1)				\$

ITEM 13

ITEM 14

Schedule C.—INCOME FROM RENTS AND ROYALTIES. (See instruction 5)

1. Kind of property	2. Amount	3. Depreciation (explain in Schedule E)	4. Repairs (explain below)	5. Other expenses (explain below)	6. Net profit (subtract 3, 4, and 5 from 2) (enter as item 4, page 1)
	\$	\$	\$	\$	\$

ITEM 15

Schedule D.—PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION. (See instruction 9)

Net profit (or loss) (line 1 minus line 18) (enter as item 9, page 1)	\$
---	----

ITEM 16

Schedule E.—EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES C, D, F, AND G

1. Description of property and year in which depreciation claimed	2. Date acquired	3. Cost or other basis	4. Assets fully depreciated in use at end of year	5. Depreciation allowed (or allowable) in prior years	6. Remaining cost or other basis to be recovered	7. Estimated life used in computing depreciation	8. Estimated remaining life from beginning of year	9. Depreciation allowed for this year
		\$	\$	\$	\$			\$



Schedule F—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS. (See Instruction 10)

Page 3

Kind of property (if necessary attach statement of descriptive data not shown below)	2. Date acquired	3. Date sold	4. Gross sales price (contract price)	5. Cost or other basis	6. 1. Expense of sale and cost of improvements subsequent to acquisition or March 1, 1913	7. Depreciation allowed (or allowable) since acquisition or March 1, 1913 (explain on Schedule E)	8. Gain or loss (column 4 plus column 7 minus the sum of columns 5 and 6)	9. Precentage	10. Amount
	Mo. Day Year	Mo. Day Year							

SHORT-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD NOT MORE THAN 18 MONTHS

			\$	\$	\$	\$	\$	100	\$
								100	
								100	
								100	

Total net short-term capital gain or loss (enter in line 1, column 2, of summary below)

\$

LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 18 MONTHS BUT NOT FOR MORE THAN 24 MONTHS

			\$	\$	\$	\$	\$	66 2/3	\$
								66 2/3	
								66 2/3	
								66 2/3	

LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 24 MONTHS

			\$	\$	\$	\$	\$	50	
								50	
								50	
								50	

Total net long-term capital gain or loss (enter in line 2, column 2, of summary below)

\$

SUMMARY OF CAPITAL NET GAINS OR LOSSES

1. Classification	2. Net gain or loss to be taken into account from column 10, above		3. Net gain or loss to be taken into account from partnership and "common trust funds"		4. Total net gain or loss to be taken into account in columns 2 and 3 of the summary		5. No net loss allowable (See Instruction 10)
	Gain	Loss	Gain	Loss	Gain	Loss	

the family, fiduciary, or business relationship to you, if any, of purchaser of any of the above items:

any of the above items were acquired by you other than by purchase, explain fully how acquired:

COMPUTATION OF ALTERNATIVE TAX

(To be used only in the case of a net long-term capital gain or loss)

Income (item 20, page 1)	\$ 3,407.32	10. Normal tax (4% of line 9)	\$ 72.25
Net long-term capital gain (item 10 (b), page 1)	175.85	11. Surtax on line 6 (See Instruction 29)	
Net long-term capital loss (item 10 (b), page 1)		12. Partial tax (line 10 plus line 11)	\$ 72.25
Net ordinary income (line 1 minus line 2 (a) or line 1 plus line 2 (b))	\$ 3,583.17	13. (a) 30% of net long-term capital gain (30% of line 2 (a))	
a. Personal exemption. (From Schedule J-1)	\$ 1,450.00	(b) 30% of net long-term capital loss (30% of line 2 (b))	\$ 52.76
Credit for dependents. (From Schedule J-2)	1,450.00	14. Alternative tax (line 12 plus line 13 (a) or line 12 minus line 13 (b))	\$ 19.49
Income (surtax net income)	\$ 2,133.17	15. Total normal tax and surtax (item 30, page 1)	\$ 65.21
a. Interest on Government obligations, etc. (See Instruction 25)		16. Tax liability (if a net long-term capital gain, on line 2 (a), enter line 14 or line 15, whichever is the lesser; if a net long-term capital loss, on line 2 (b), enter line 14 or line 15, whichever is the greater) (Enter as item 31, page 1)	\$ 65.21
Earned income credit. (From Schedule K-1 or K-2)	326.95		
Income subject to normal tax	\$ 1,806.22		

Schedule G—GAINS AND LOSSES FROM SALES OR EXCHANGES OF PROPERTY OTHER THAN CAPITAL ASSETS (See Instruction 10)

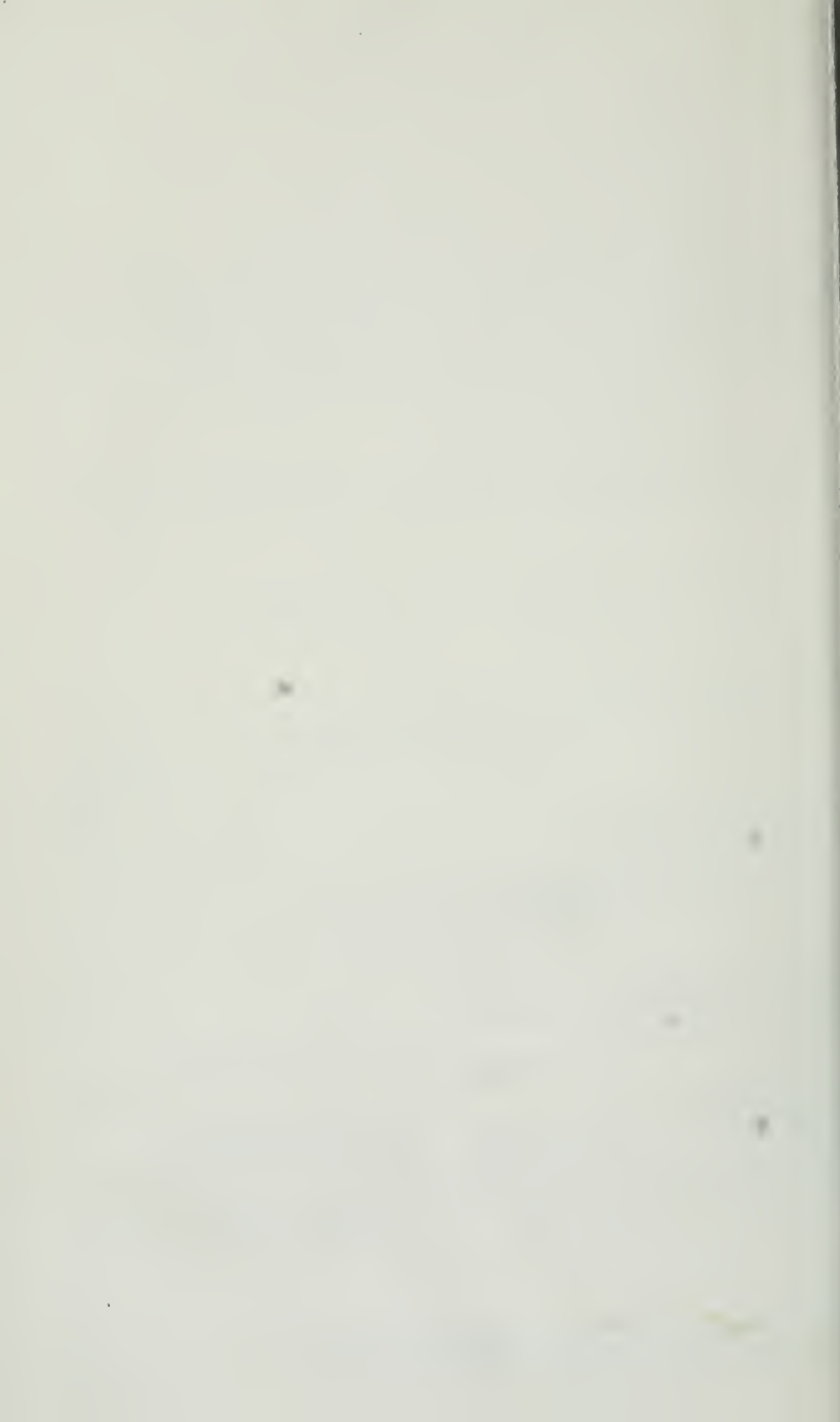
1. Kind of property	2. Date acquired	3. Gross sales price (contract price)	4. Cost or other basis	5. Expense of sale and cost of improvements subsequent to acquisition or March 1, 1913	6. Depreciation allowed (or allowable) since acquisition or March 1, 1913 (explain on Schedule E)	7. Gain or loss (column 3 plus column 6 minus the sum of columns 4 and 5)
---------------------	------------------	---------------------------------------	------------------------	--	---	---

Total net gain (or loss) (enter as item 10 (c), page 1)

\$

the family, fiduciary, or business relationship to you, if any, of purchaser of any of the above items:

any of the above items were acquired by you other than by purchase, explain fully how acquired:





C. A. And Wanda V. Van Dusen

Reconciliation Of The Income Assigned To Wanda V. Van Dusen
In The First Amended Return For The Year 1938.

<u>Items</u>	<u>Total</u>	<u>C. A. Van Dusen</u>	<u>Wanda V. Van Dusen</u>
<u>Income:</u>			
1. Gross salary	\$15,205.04		
Deduct amount excluded	(1) 8,666.06		
Remainder - salary subject to tax	\$ 6,538.98	\$ 3,269.49	\$ 3,269.49
2. Dividends	4,244.00	2,122.00	2,122.00
8. Rents and royalties	925.13	462.56	462.57
9. Loss from business or profession	294.54	147.27	147.27
10b. Net long-term loss from sale of capital assets	351.70	175.85	175.85
11. Other income	(2) 1,500.00	750.00	750.00
Total	\$10,711.61	\$ 5,355.81	\$ 5,355.80
<u>Deductions:</u>			
13. Contributions	\$ 50.00	\$ 25.00	\$ 25.00
14. Interest	1,249.99	624.99	625.00
15. Taxes	163.92	85.43	78.49
17. Bad debts	750.00	375.00	375.00
18. Other deductions authorized by law	190.00	95.00	95.00
Total	\$ 2,403.91	\$ 1,205.42	\$ 1,198.49
Remainder - net income	\$ 8,307.70	\$ 4,150.39	\$ 4,157.31

NOTES:

- (1) This amount includes:

Salary earned during the seven months taxpayer was absent
 from the United States \$ 8,600.01

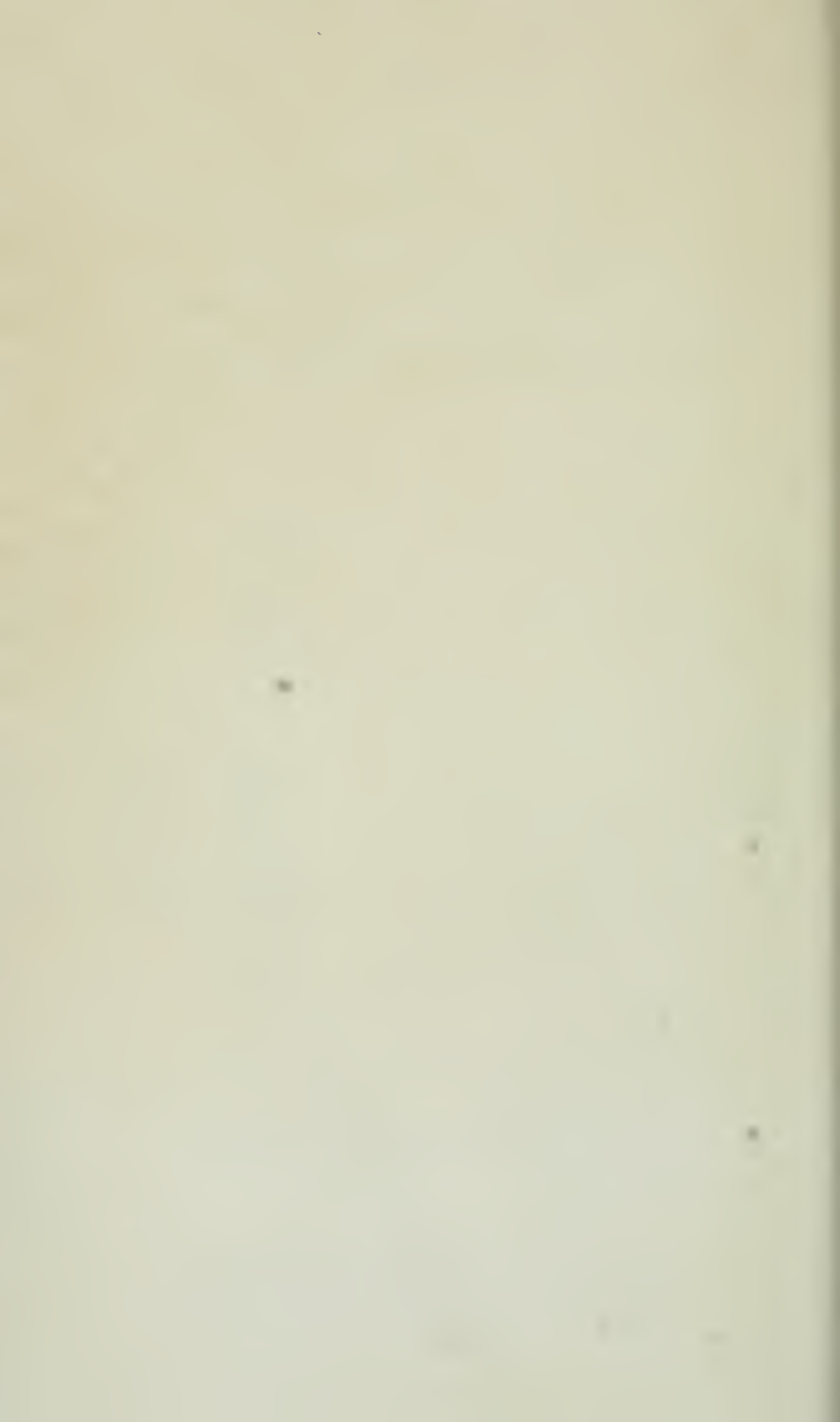
California unemployment insurance tax of 1% on \$6,605.03
 of salary earned during 1938 while taxpayer was in the
 United States 66.05

Total

\$ 8,666.06

- (2) The \$1500 represents the fair market value at February 23, 1938,
 of 1500 shares of the common stock of Aero Industries
 Technical Institute, 5245 West San Fernando Road, Los
 Angeles, California, received in consideration for serving
 on the Board of Directors and Executive Committee of that
 corporation.

E-5



CONSOLIDATED AIRCRAFT CORPORATION
LINDBERGH FIELD, SAN DIEGO, CALIF.

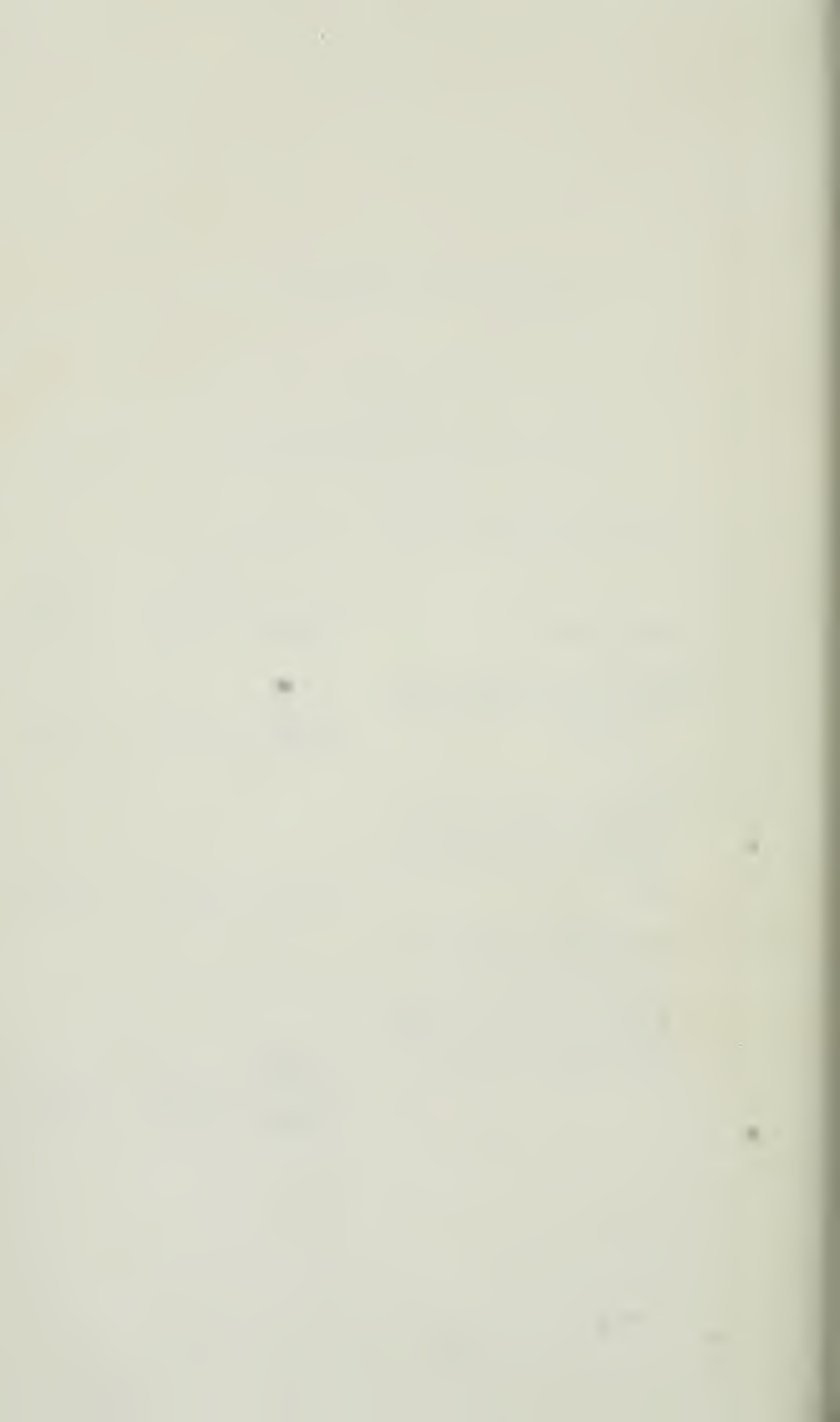
UNITED STATES
INTERNAL REVENUE TAX RETURN
YEAR 1938

C. A. Van Vusen And Sandra V. Van Vusen
3738 Aeryllis Drive, San Diego, California

CONTINUED
Explanation Of Deductions Claimed In Items 13, 14, 17, and 18

	Total	C. A. Van Vusen	Sandra V. Van Vusen
Item 13 - San Diego Community Chest	\$ 60.00	\$ 25.00	\$ 25.00
Item 14 - Interest paid:			
Bank of America, interest on note	\$ 874.99		
Baltimore National Bank, interest on mortgage	375.00		
Total	<u>\$1,249.99</u>	<u>\$ 624.99</u>	<u>\$ 625.00</u>
Item 17 - Bad Debts:			
Uncollectible check for \$750.00 dated May 5, 1938, received from J. H. Luther of San Diego, California, in payment of an Oldsmobile coupe sold April 12, 1938	\$ 750.00	\$ 375.00	\$ 375.00
Item 18 - Other deductions authorized by law:			
Membership fee - Institute of Aeronautical Science	\$ 10.00		
Loss of two months rental on residence at 2811 Freeman Street, San Diego, California, vacated as a result of absence from the United States on business	180.00		
Total	<u>\$ 190.00</u>	<u>\$ 95.00</u>	<u>\$ 95.00</u>
Total	<u>\$2,239.99</u>	<u>\$1,119.99</u>	<u>\$1,120.00</u>

E-4



CONSOLIDATED AIRCRAFT CORPORATION
LINDBERGH FIELD, SAN DIEGO CALIF.

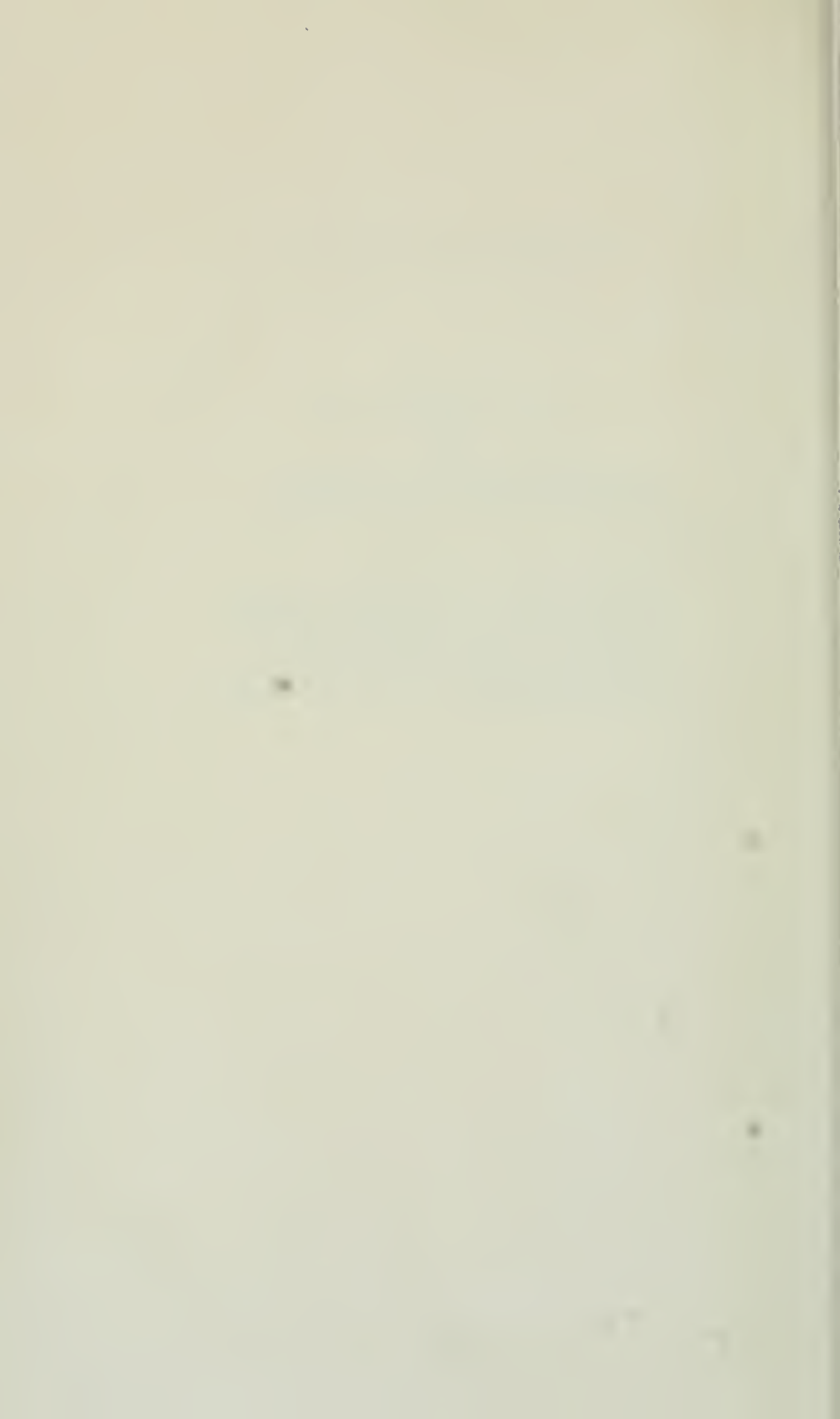
UNITED STATES
INDIVIDUAL INCOME TAX RETURN
YEAR
1968

C. A. Van Dusen And Wanda V. Van Dusen
3788 Anayllis Drive, San Diego, California

Schedule explaining Item 11, Other Income -

The \$1800 represents the fair market value at February 28, 1968, of 1800 shares of the common stock of Aero Industries Technical Institute, 8845 West San Fernando Road, Los Angeles, California, received in consideration for serving on the Board of Directors and Incentive Committee of that corporation.

E-7



1938 INDIVIDUAL INCOME TAX RETURN 1938

(Auditor's Stamp)

FOR NET INCOMES OF MORE THAN \$5,000 FROM SALARIES, WAGES, DIVIDENDS, INTEREST, ANNUITIES, AND FOR INCOMES FROM OTHER SOURCES REGARDLESS OF AMOUNTS

For Calendar Year 1938

or fiscal year beginning 1938, and ended 1939

(Before Preparing This Return, Read the Instructions Carefully)

To be filed with the Collector of Internal Revenue for your district not later than the 15th day of the third month following the close of your taxable year

PRINT NAME AND ADDRESS PLAINLY (See Instruction E)

Wanda V. Van Dusen

(Name) (If married, name of husband and wife, if a joint return)

3738 Anayyllis Drive

(Street and number, or rural route)

San Diego

San Diego

California

(Post office)

(County)

(State)

(Do not use these spaces)

File No. 7-949
Date April 20 1939

RECEIVED
WIFE REMITTANCE
MAR 23 1939
COLL. INT. REV.
LOS ANGELES, CAL.

Cash—Check—M.O.

First Payment

INCOME

1. Salaries and other compensation for personal services. (From Schedule A)
2. Dividends.
3. Interest on bank deposits, notes, mortgages, etc.
4. Interest on corporation bonds.
5. Taxable interest on government obligations, etc. (From Schedule B)
6. Income (or loss) from partnerships, syndicates, pools, etc. (other than capital gains or losses). (For each name and address)
7. Income from fiduciaries. (For each name and address)
8. Rents and royalties. (From Schedule C)
9. Income (or loss) from business or profession. (From Schedule D)
10. (a) Net short-term gain from sale or exchange of capital assets. (From Schedule E)
- (b) Net long-term gain (or loss) from sale or exchange of capital assets.
- (c) Net gain (or loss) from sale or exchange of property other than capital assets. (From Schedule G)
11. Other income (including income from annuities). (Check sources on separate schedule if necessary)
12. Total income in items 1 to 11. $\frac{1}{2}$ of total income of husband.

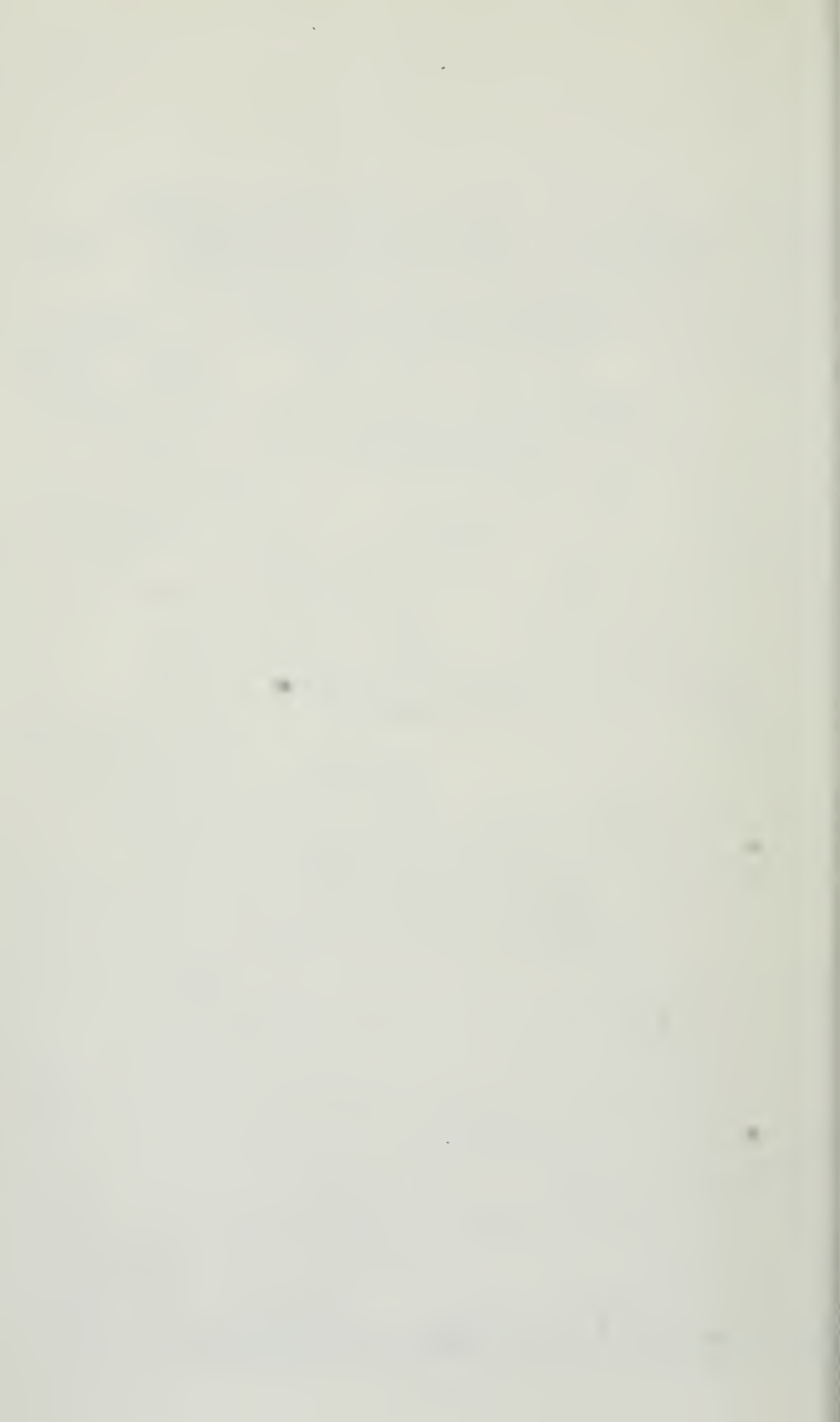
DEDUCTIONS

13. Contributions paid. (Explain in Schedule H)
14. Interest. (Explain in Schedule H)
15. Taxes. (Explain in Schedule H)
16. Losses from fire, storm, shipwreck, or other casualty, or theft. (Explain in Schedule H)
17. Bad debts. (Explain in Schedule H)
18. Other deductions authorized by law. (Explain in Schedule H)
19. Total deductions in items 13 to 18.
20. Net income (item 12 minus item 19) Net income of husband, C.A. Van Dusen \$ 3,407.31

COMPUTATION OF TAX

21. Net income (item 20 above) \$ 3,407.31
22. Less: Personal exemption. (From Schedule J-1) \$ 1,450.00
23. Credit for dependents. (From Schedule J-2) 1,450.00
24. Balance (surplus net income) \$ 1,257.31
25. Less: Interest on Government obligations, etc. (See Instruction 25)
26. Earned income credit. (From Schedule K-1 or K-2) 326.96
27. Balance subject to normal tax \$ 1,630.35
28. Normal tax (4% of item 27) \$ 65.22
29. Surplus on item 24. (See Instruction 29)
30. Total (item 28 plus item 29) \$ 65.21
31. Total tax (item 30, or if you had a net long-term capital gain or loss, enter line 16, Schedule F) \$ 65.21
32. Less: Income tax paid at SOURCE
33. Income tax paid to a foreign country or U.S. possession. (Attach Form 116)
34. Balance of tax (item 31 minus items 32 and 33) \$ 65.21

NOTE—One form marked "DUPLICATE COPY" must be filed with this original return (36 will be assessed if duplicate copy is not filed)



Schedule A.—INCOME RECEIVED FROM OTHERS CONSISTING OF SALARIES, WAGES, FEES, AND OTHER COMPENSATION FOR PERSONAL SERVICES. (See Instruction 1)

1. Name and address of employer and nature of income	2. Amount	3. Exemptions (item 4)	4. Amount
	\$		\$
Total of column 2 minus total of column 4 (enter as item 1, page 1)			\$

Schedule B.—INTEREST ON GOVERNMENT OBLIGATIONS, ETC. (See Instruction 5)

1. Obligations or securities	2. Amount received at end of year including your proportionate share of such obligations held by estates, trusts, partnerships, or common trust funds	3. Interest received or accrued during the year	4. Interest exempt from taxation	5. Interest on amount or basis of exemption
(a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions	\$	\$	All	EXEMPT
(b) Obligations issued under Federal Farm Loan Act, or under such Act as amended			All	EXEMPT
(c) Obligations of United States issued on or before September 1, 1917			All	EXEMPT
(d) Treasury Notes, Treasury Bills, and Treasury Certificates of Indebtedness			All	EXEMPT
(e) United States Savings Bonds and Treasury Bonds			\$	\$
(f) Obligations of instrumentalities of the United States (other than obligations to be reported in (b) above)			None	
(g) Total (enter as item 5, page 1)				\$

Schedule C.—INCOME FROM RENTS AND ROYALTIES. (See Instruction 6)

1. Kind of property	2. Amount	3. Depreciation (applies to Schedule E)	4. Repairs (applies below)	5. Other expenses (includes below)	6. Net profit (includes 2 minus sum of columns 3, 4, and 5) (enter as item 6, page 1)
	\$	\$	\$	\$	\$

Explanation of deductions claimed in columns 4 and 5

Schedule D.—PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION. (See Instruction 9)

1. Total receipts (state nature of business or profession)	2. COST OF GOODS SOLD	3. OTHER BUSINESS DEDUCTIONS	4. Total
2. Labor	\$	10. Salaries not included as "Labor" (do not deduct compensation for yourself)	\$
3. Material and supplies		11. Interest on business indebtedness	
4. Merchandise bought for sale		12. Taxes on business and business property	
5. Other costs (includes below)		13. Losses (includes below)	
6. Plus inventory at beginning of year		14. Bad debts arising from sales or services	
7. Total (lines 2 to 6)	\$	15. Depreciation, obsolescence, and depletion (includes in Schedule E)	
8. Less inventory at end of year		16. Rent, repairs, and other expenses (includes below or on separate sheet)	
9. Net cost of goods sold (line 7 minus line 8)	\$	17. Total (lines 10 to 16)	\$
Enter "C," "C or M," on lines 6 and 8 to indicate whether inventories are valued at cost, or cost or market, whichever is lower.		18. Total deductions (line 9 plus line 17)	
		19. Net profit (or loss) (line 1 minus line 18) (enter as item 9, page 1)	\$

Explanation of deductions claimed in lines 5, 13, and 16

Schedule E.—EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES C, D, F, AND G

1. Kind of property (if buildings, state material of which constructed)	2. Date acquired	3. Cost or other basis	4. Assets fully depreciated by use at end of year	5. Depreciation claimed for current year	6. Depreciation claimed for prior years	7. Estimated value at end of year	8. Estimated value at beginning of year	9. Depreciation for year
		\$	\$	\$	\$	\$	\$	\$



Schedule F.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS. (See Instruction 10)

Page 3

1. Kind of property (If security, state name of issuer; if livestock, state name of owner)	2. Date acquired	3. Date sold	4. Gross sales price (net of cost)	5. Cost or other basis	6. Expenses of sale and cost of improvements subsequent to acquisition or March 1, 1913	7. Depreciation allowed (or allowable) since acquisition or March 1, 1913 (attach in Schedule E)	8. Gain or loss (column 4 plus column 7 minus the sum of columns 5 and 6)	9. Gain or loss to be taken into account
	Mo. Day Year	Mo. Day Year						10. Amount

SHORT-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD NOT MORE THAN 18 MONTHS

								100
								100
								100
								100

Total net short-term capital gain or loss (enter in line 1, column 2, of summary below)

LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 18 MONTHS BUT NOT FOR MORE THAN 24 MONTHS

								66%
								66%
								66%
								66%

LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 24 MONTHS

								50
								50
								50
								50

Total net long-term capital gain or loss (enter in line 2, column 2, of summary below)

SUMMARY OF CAPITAL NET GAINS OR LOSSES

1. Classification	2. Net gain or loss to be taken into account from column 10, above		3. Net gain or loss to be taken into account from partnership and "common trust funds"		4. Total net gain or loss to be taken into account in columns 2 and 3 of this summary	
	Gain	Loss	Gain	Loss	Gain	Loss
Total net short-term capital gain or loss (enter as item 10 (a), page 1, amount of gain shown in column 4)						No net loss allowable (See Instruction 10)
Total net long-term capital gain or loss (enter as item 10 (b), page 1, amount of gain or loss shown in column 4)						

State the family, fiduciary, or business relationship to you, if any, of purchaser of any of the above items:

If any of the above items were acquired by you other than by purchase, explain fully how acquired:

COMPUTATION OF ALTERNATIVE TAX

(To be used only in the case of a net long-term capital gain or loss)

1. Net income (from 28, page 1)	\$ 3,407.32	10. Normal tax (4% of line 9)	\$ 72.25
2. (a) Net long-term capital gain (from 10 (a), page 1)		11. Surtax on line 6 (See Instruction 29)	
(b) Net long-term capital loss (from 10 (b), page 1)	175.85	12. Partial tax (line 10 plus line 11)	\$ 72.25
3. Ordinary net income (line 1 minus line 2 (a) or line 1 plus line 2 (b))	\$ 3,583.17	13. (a) 30% of net long-term capital gain (30% of line 2 (a))	
4. Less: Personal exemption. (From Schedule J-1)	\$ 1,450.00	(b) 30% of net long-term capital loss (30% of line 2 (b))	\$ 52.76
5. Credit for dependents. (From Schedule J-2)	1,450.00	14. Alternative tax (line 12 plus line 13 (a) or line 12 minus line 13 (b))	\$ 19.49
6. Balance (surtax net income)	\$ 2,133.17	15. Total normal tax and surtax (from 28, page 1)	\$ 65.21
7. Less: Interest on Government obligations, etc. (See Instruction 25)		16. Tax liability (if a net long-term capital gain, on line 2 (a), enter line 14 or line 15, whichever is the lesser; if a net long-term capital loss, on line 2 (b), enter line 14 or line 15, whichever is the greater). (Enter as item 31, page 1)	\$ 65.21
8. Earned income credit. (From Schedule K-1 or K-2)	\$ 326.95		
9. Balance subject to normal tax	\$ 1,806.22		

Schedule G.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF PROPERTY OTHER THAN CAPITAL ASSETS (See Instruction 16)

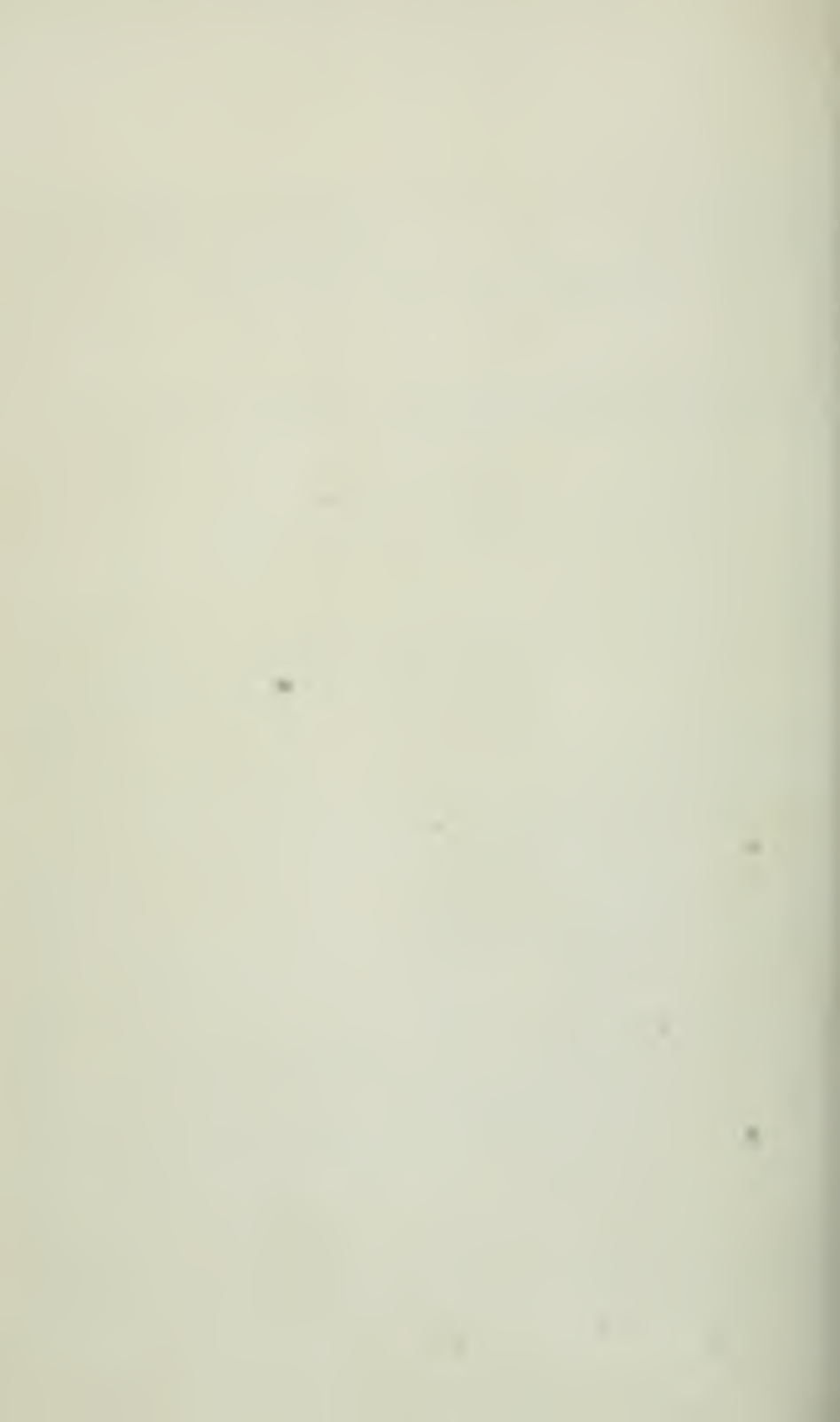
1. Kind of property	2. Date acquired	3. Gross sales price (net of cost)	4. Cost or other basis	5. Expenses of sale and cost of improvements subsequent to acquisition or March 1, 1913	6. Depreciation allowed (or allowable) since acquisition or March 1, 1913 (attach in Schedule E)	7. Gain or loss (column 3 plus column 6 minus the sum of columns 4 and 5)

Total net gain (or loss) (enter as item 10 (c), page 1)

State the family, fiduciary, or business relationship to you, if any, of purchaser of any of the above items:

If any of the above items were acquired by you other than by purchase, explain fully how acquired:

9-57205



Schedule H.—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 13, 14, 15, 16, 17, AND 18

Taxes

Item 15: California automobile tax (1939) \$10.00; Federal tax on stock transfers (1939) \$1.15; California personal income tax (1939) \$1.17; Federal tax on club dues (Cuyamaca Club \$3.00; Bankers' Club \$1.12; and La Bolla Country Club \$2.30; Federal admission tax on theater tickets \$2.50; total \$19.14.
See accompanying schedule H for items 13, 14, 17, and 18

Schedule I.—NONTAXABLE INCOME OTHER THAN INTEREST REPORTED IN SCHEDULE B. (See Instruction 12)

1. Source of income	2. Nature of income	3. Amount
		\$

Schedule J.—EXPLANATION OF CREDITS CLAIMED IN ITEMS 22 AND 23. (See Instructions 22 and 23)

(1) Personal Exemption

(2) Credit for Dependents

Status	Number of months during the year in such status	Credit claimed	Name of dependent and relationship	Number of months during the year		Credit claimed
				Under 18 years old	Over 18 years old	
Single, or married and not living with husband or wife		\$				\$
Married and living with husband or wife	12	1,450.00				
Head of family (explain below)						
1/2 (\$1,450) of personal exemption claimed by husband, C. A. Van Dusen			Reason for support if over 18 years old			

Schedule K.—COMPUTATION OF EARNED INCOME CREDIT. (See Instruction 26)

(1) If your net income is \$3,000 or less, use only this part of schedule

(2) If your net income is more than \$3,000, use only this part of schedule

Net income (item 20, page 1)	\$	Earned net income (not more than \$14,000)	\$ 3,269.49
Earned income credit (10% of net income, above)		Net income (item 20, page 1)	3,407.31
		Earned income credit (10% of earned net income or net income, above, whichever amount is smaller, but do not enter less than \$300)	326.95

QUESTIONS

1. State your principal occupation or profession. Housewife
2. Check whether you are a citizen ☒ or a resident alien ☐.
3. If you filed a return for the preceding year, to which Collector's office was it sent? Los Angeles, Calif.
4. Are items of income or deductions of both husband and wife included in this return? (See Instruction A) No
5. State name of husband ex vivo if a separate return was made; personal exemption, if any, claimed thereon; and the Collector's office to which it was sent. C. A. Van Dusen, Personal exemption \$1,050.00, Los Angeles, Calif.
6. Check whether this return was prepared on the cash ☐ or accrual ☐ basis. Cash for Personal
7. Did you at any time during your taxable year own directly or indirectly any stock of a foreign corporation or a personal holding company as defined by section 402? (Answer "yes" or "no") No (If answer is "yes," attach schedule required by Instruction M.)

AFFIDAVIT. (See Instruction F)

I/we swear (or affirm) that this return (including any accompanying schedules and statements) has been examined by me/us, and to the best of my/our knowledge and belief is a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Revenue Act of 1938 and the regulations issued under authority thereof.

Subscribed and sworn to by Wanda J. Van Dusen Cassidy J. Van Dusen
before me this 22 day of March, 1939.
Jean Hinkley
(Signature) (See Instruction F)

A return made by a married couple is considered to be made by both. (See Instruction F)

(If this is a joint return (not made by agent), it must be signed by both husband and wife. It must be sworn to before a proper officer by the spouses preparing the return. If neither or both prepare the return, it must be sworn to by both spouses.)

AFFIDAVIT. (See Instruction F)

(If this return was prepared for you by some other person, the following affidavit must be executed)

I/we swear (or affirm) that I/we prepared this return for the person or persons named herein and that the return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the income tax liability of the person or persons for whom this return has been prepared of which I/we have any knowledge.

Subscribed and sworn to before me this _____ day
of _____, 193__

(Signature of person preparing the return)

(Signature of person preparing the return)

(Signature and title of officer administering oath)

(Place of firm or employer, if any)



UNITED STATES
INDIVIDUAL INCOME TAX RETURN
YEAR 1938

C. A. Van Dusen And Wanda V. Van Dusen
3738 Amaryllis Drive, San Diego, California

SCHEDULE H

Explanation Of Deductions Claimed In Items 13, 14, 17, and 18

	<u>Total</u>	<u>C. A. Van Dusen</u>	<u>Wanda V. Van Dusen</u>
Item 13 - San Diego Community Chest	\$ 80.00	\$ 25.00	\$ 25.00
Item 14 - Interest paid:			
Bank of America, interest on note	\$ 874.99		
Baltimore National Bank, interest on mortgage	375.00		
Total	<u>\$1,249.99</u>	<u>\$ 624.99</u>	<u>\$ 625.00</u>
Item 17 - Bad debts:			
Uncollectible check for \$750.00 dated May 5, 1938, received from J. H. Luther of San Diego, California, in payment of an Oldsmobile coupe sold April 12, 1938	\$ 750.00	\$ 375.00	\$ 375.00
Item 18 - Other deductions authorized by law:			
Membership fee - Institute of Aeronautical Science	\$ 12.00		
Loss of two months rental on residence at 3211 Freeman Street, San Diego, California, vacated as a result of absence from the United States on business	180.00		
Total	<u>\$ 192.00</u>	<u>\$ 96.00</u>	<u>\$ 96.00</u>
Total	<u>\$2,330.99</u>	<u>\$1,119.99</u>	<u>\$1,121.00</u>

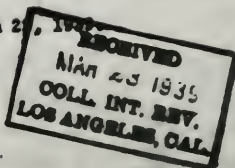


Look up
Hawkins
see if we requested
for Wanda Van Dusen

C. A. VAN DUSEN

Treasury Department
Internal Revenue Service
939 Broadway
Los Angeles, Calif.

March 2, 1936



Gentlemen:

I am enclosing herewith separate income tax returns for the calendar year 1935 for Wanda V. Van Dusen and for myself, C. A. Van Dusen.

I am also enclosing checks, one in the amount of \$85.84 for Mrs. Van Dusen's income tax, including 33% interest, and a check in the amount of \$85.27 for my income tax, including 33% interest. The interest is included in accordance with your letter of extension of time dated March 10, 1935, copy of which is attached to each of the income tax returns.

Very truly yours,



C. A. Van Dusen.

Encls.

c/o Consolidated Aircraft Corporation
Lindbergh Field, San Diego, Calif.



UNITED STATES INDIVIDUAL INCOME TAX RETURN 1939

Page 1

(Auditor's Stamp)
REVIEWED
AUDIT REVIEW DIVISION E
By Inez Justus
DATE MAY 8 1940

FOR NET INCOMES OF MORE THAN \$5,000 FROM SALARIES, WAGES,
DIVIDENDS, INTEREST, ANNUITIES, AND FOR INCOMES FROM
OTHER SOURCES REGARDLESS OF AMOUNTS

For Calendar Year 1939

or fiscal year beginning _____, 1938, and ended _____, 1940

To be filed with the Collector of Internal Revenue for your district not later than the 15th day of the third
month following the close of your taxable year

PRINT NAME AND ADDRESS PLAINLY. (See Instructions C)

Wanda V. Van Dusen

(Name) (Use given names of both husband and wife, if this is a joint return)

6738 Amaryllis Drive

(Street and number, or rural route)

San Diego

(Post office)

San Diego

(County)

California

(State)

(Do not use these spaces)
File Code 2949
Serial No. 285860
District 8-CALIF
(Collector's Stamp)
WITH REMITTANCE
MAY 15 1940
COLL INT REV
LOS ANGELES, CAL.
CUSTO-M.O.
549

INCOME

1. Salaries and other compensation for personal services. (From Schedule A)
2. Dividends
3. Interest on bank deposits, notes, mortgages, etc.
4. Interest on corporation bonds
5. Taxable interest on Government obligations, etc. (From Schedule B)
6. Income (or loss) from partnerships, syndicates, pools, etc. (other than capital gains or losses)
7. Income from salaries. (Furnish names and addresses)
8. Rents and royalties. (From Schedule C)
9. Income (or loss) from business or profession. (From Schedule D)
10. (a) Net short-term gain from sale or exchange of capital assets. (From Schedule E)
- (b) Net long-term gain (or loss) from sale or exchange of capital assets. (From Schedule E)
- (c) Net gain (or loss) from sale or exchange of property other than capital assets. (From Schedule E)
11. Other income (including income from annuities) (State source)
12. Total income in items 1 to 11. (Enter amounts from Schedule E)

POSTAL
MAY 21 1940
DATE

RECEIVED
MAY 21 1940
UNITED STATES
TREASURY

DEDUCTIONS of total income of
husband, C. A. Van Dusen

13. Contributions paid. (Exempt in Schedule F)
14. Interest. (Exempt in Schedule F)
15. Taxes. (Exempt in Schedule F)
16. Losses from fire, storm, shipwreck, or other casualty, or theft. (Exempt in Schedule F)
17. Bad debts. (Exempt in Schedule F)
18. Other deductions authorized by law. (Exempt in Schedule F)
19. Total deductions in items 13 to 18
20. Net income (from item 12 minus item 19)

8,339.21
12.50
1114.00
687.76
5.00
1,819.26
6,519.95

COMPUTATION OF TAX

21. Net income (from item 20 above)	\$ 6,519.95	26. Normal tax (4% of item 27)	\$ 176.72
22. Less: Personal exemption.		29. Surtax on item 24. (See Instructions 29)	42.80
(From Schedule F-1)	\$1,450.00	30. Total (item 26 plus item 29)	\$ 219.52
Credit for dependents.		31. Total tax (item 30, or if you had a net long-term capital gain or loss, enter line 16, Schedule F)	\$ 219.52
(From Schedule F-2)	\$1,450.00		
24. Balance (surplus net income)	\$ 5,069.95	32. Less: Income tax paid at source.	
25. Less: Income on Government obligations. (See Instructions 25)		33. Income tax paid to a foreign country or U.S. possession. (Attach Form 114)	
Excess income credit.			
(From Schedule B-4 or B-5)	\$652.00		
27. Balance subject to normal tax	\$ 4,417.95	34. Balance of tax (item 31 minus items 32 and 33)	\$ 219.52

NOTE—One form marked "DUPLICATE COPY" must be filed with this original return (it will be assessed if duplicate copy is not filed)

E. X. F.



1. Name and address of employer and nature of income	2. Amount	3. Excess (loss)	4. Amount
8			5
Total of column 2 minus total of column 4 (enter as item 1, page 1)			5

Schedule B.—INTEREST ON GOVERNMENT OBLIGATIONS, ETC. (See Instruction C)

1. Obligations or securities	2. Amount (in full) and of what including post-prepayment amort of such obligations held by estate trust or partner obligee, or common trust funds	3. Interest received or accrued during the year	4. Interest exempt from taxation	5. Interest on amount in excess of exemption
a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions	\$	\$	All	XXXXXXXXXX
b) Obligations issued under Federal Farm Loan Act, or under such Act as amended			All	XXXXXXXXXX
c) Obligations of United States issued on or before September 1, 1917			All	XXXXXXXXXX
d) Treasury Notes, Treasury Bills, and Treasury Certificates of Indebtedness			All	XXXXXXXXXX
e) United States Savings Bonds and Treasury Bonds				
f) Obligations of instrumentalities of the United States (other than obligations to be reported in (H) above)			\$	\$
			None	
Total (under as item 5, page 1)				\$

Schedule C.—INCOME FROM RENTS AND ROYALTIES. (See Instruction B)

[illegible]

Explanation of deductions
claimed in columns 4 and 5

Schedule D.—PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION. (See instruction #)

business name and address if different from name and address on page 1		8	
Total receipts (state nature of business or profession)			
COST OF GOODS SOLD		OTHER BUSINESS DEDUCTIONS	
Labor	9	10. Salaries not included as "Labor" (do not deduct compensation for yourself)	9
Material and supplies		11. Interest on business indebtedness	
Merchandise bought for sale		12. Taxes on business and business property	
Other costs (itemize below)		13. Losses (explain below)	
Plus inventory at beginning of year		14. Bad debts arising from sales or services	
Total (lines 2 to 6)	8	15. Depreciation, obsolescence, and depletion (explain in Schedule E)	
Less inventory at end of year		16. Rent, repairs, and other expenses (itemize below or on separate sheet)	
Net cost of goods sold (line 7 minus line 8)	9	17. Total (lines 10 to 16)	9
If the production, manufacture, purchase and sale of merchandise is an income-producing factor, inventories are required. Enter "C," "M," or "N" on lines 6 and 8 to indicate whether inventories are valued at cost, or cost or market, whichever is lower.		18. Total deductions (line 9 plus line 17)	
		19. Net profit (or loss) (line 1 minus line 18) (enter as item 9, page 1)	8

Explanation of deductions
claimed in lines 5, 13, and 16

Schedule E.—EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES C, D, F, AND G

[illegible]



17

Page 3

Schedule F.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS. (See Instruction 10)

Kind of property (if primary with a statement of depreciation not shown below)	2. Date acquired	3. Date sold	4. Gross sales price (contract price)	5. Cost or other basis	6. Expense of sale and cost of improvements subsequent to acquisition or March 1, 1913 (explain in Schedule E)	7. Depreciation allowed (or allowable) after acquisition or March 1, 1913 (explain in Schedule E)	8. Gain or loss (column 6 plus column 7 minus the sum of columns 5 and 6)	9. Gain or loss to be taken into account	
	Mo. Day Year	Mo. Day Year						Per centage	10. Amount

SHORT-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD NOT MORE THAN 18 MONTHS

			\$	\$	\$	\$		100	\$
								100	
								100	
								100	
								100	
Total net short-term capital gain or loss (enter in line 1, column 3, of summary below)									\$

LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 18 MONTHS BUT NOT FOR MORE THAN 24 MONTHS

			\$	\$	\$	\$		66 2/3	\$
								66 2/3	
								66 2/3	
								66 2/3	
Total net long-term capital gain or loss (enter in line 2, column 3, of summary below)									\$

LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 24 MONTHS

			\$	\$	\$	\$		50	
								50	
								50	
								50	
Total net long-term capital gain or loss (enter in line 2, column 3, of summary below)									\$

SUMMARY OF CAPITAL NET GAINS OR LOSSES

1. Classification	2. Net short-term capital loss of preceding taxable year (not in excess of net income for each year)		3. Net gain or loss to be taken into account from column 10, above		4. Net gain or loss to be taken into account from partnerships and "common trust funds"		5. Total net gain or loss to be taken into account or columns 2, 3, and 4 of this summary	
	Gain	Loss	Gain	Loss	Gain	Loss	Gain	Loss
Total net short-term capital gain or loss (enter as item 10 (a), page 1, amount of gain shown in column 5).....	\$	\$	\$	\$	\$	\$	\$	No net loss allowable (see Instruction 10)
Total net long-term capital gain or loss (enter as item 10 (b), page 1, amount of gain or loss shown in column 5).....	\$	\$	\$	\$	\$	\$	\$	\$

Is the family, fiduciary, or business relationship to you, if any, of purchaser of any of the above items: _____

Any of the above items were acquired by you other than by purchase, explain fully how acquired: _____

**COMPUTATION OF ALTERNATIVE TAX
(To be used only in the case of a net long-term capital gain or loss)**

Net income (item 20, page 1). (See Instruction 10).....	\$	10. Normal tax (4% of line 9).....	\$
(a) Net long-term capital gain (item 10 (b), page 1).....		11. Surtax on line 6. (See Instruction 29).....	
(b) Net long-term capital loss (item 10 (b), page 1).....		12. Partial tax (line 10 plus line 11).....	\$
Ordinary net income (line 1 minus line 3 (a) or line 1 plus line 2 (b)). (See Instruction 10).....	\$	13. (a) 30% of net long-term capital gain (30% of line 2 (a)).....	
Less: Personal exemption. (From Schedule J-1).....	\$	(b) 30% of net long-term capital loss (30% of line 2 (b)).....	
Credit for dependents. (From Schedule J-2).....	\$	14. Alternative tax (line 12 plus line 13 (a) or line 12 minus line 13 (b)).....	\$
Balance (surtax net income).....	\$	15. Total normal tax and surtax (item 30, page 1).....	\$
Less: Interest on Government obligations, etc. (See Instruction 25).....	\$	16. Tax liability (if a net long-term capital gain, on line 2 (a), enter line 14 or line 15, whichever is the lower; if a net long-term capital loss on line 2 (b), enter line 14 or line 15, whichever is the greater). (Enter as item 31, page 1).....	\$
Earned income credit. (From Schedule K-1 or K-2). (See last 10).....	\$		
Balance subject to normal tax.....	\$		

**Schedule G.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF PROPERTY OTHER THAN CAPITAL ASSETS
(See Instruction 10)**

1. Kind of property	2. Date acquired	3. Gross sales price (contract price)	4. Cost or other basis	5. Expense of sale and cost of improvements subsequent to acquisition or March 1, 1913	6. Depreciation allowed (or allowable) upon acquisition or March 1, 1913 (explain in Schedule E)	7. Gain or loss (column 3 plus column 6 minus the sum of columns 4 and 5)
		\$	\$	\$	\$	
Total net gain (or loss) (enter as item 10 (c), page 1).....						

Is the family, fiduciary, or business relationship to you, if any, of purchaser of any of the above items: _____

Any of the above items were acquired by you other than by purchase, explain fully how acquired: _____



Schedule B.—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 12, 14, 15, 16, 17, AND 18

Page 4

1. Item No.	2. Explanation	3. Amount	4. Item No. (Continued)	5. Explanation (Continued)	6. Amount (Continued)
		\$			\$

Schedule C.—NONTAXABLE INCOME OTHER THAN INTEREST REPORTED IN SCHEDULE B. (See Instruction C)

1. Source of income	2. Nature of income	3. Amount
		\$

Schedule D.—EXPLANATION OF CREDITS CLAIMED IN ITEMS 22 AND 23. (See Instructions 22 and 23)

(A) Personal Exemption			(B) Credit for Dependents		
Name	Number of months during the year in each status	Credit claimed	Name of dependent and relationship	Number of months during the year Under 18 years old Over 18 years old	Credit claimed
Self, or married and not living with husband or wife		\$			\$
Child and living with husband or wife	12	1,450.00			
Child (single below)					
Other balance of personal exemption claimed			Reason for support if over 18 years old		
Husband, C. A. Van Dusen					

Schedule E.—COMPUTATION OF EARNED INCOME CREDIT. (See Instruction 24)

(A) If your net income is \$5,000 or less, use only this part of schedule	(B) If your net income is more than \$5,000, use only this part of schedule
Net income (Item 20, page 1)..... \$	or husband's salary Earned net income (not more than \$14,000)..... \$ 7,933.36
Net income credit (10% of net income).....	Net income (item 20, page 1)..... 5,519.95
	Earned income credit (10% of earned net income or 10% of net income, above, whichever amount is smaller, but do not enter less than \$300)..... 652.00

QUESTIONS

- State your principal occupation or profession Housewife
- Check whether you are a citizen ☒ or a resident alien ☐.
- If you filed a return for the preceding year, to which Collector's office was it sent? Los Angeles, California
- Amount of income or deductions of both husband and wife included in this return? No
- State (a) Name of husband or wife if separate return was made C. A. Van Dusen
- (b) Personal exemption, if any, claimed thereon 1,050.00
- (c) Collector's office to which it was sent Los Angeles, Cal.
6. Check whether this return was prepared on the cash ☒ or accrual ☐ basis.
7. Did you at any time during your taxable year own directly or indirectly any stock of a foreign corporation or a personal holding company as defined by section 501? (Answer "yes" or "no") No (If answer is "yes," attach statement required by instruction J.)

AFFIDAVIT. (See Instruction E)

I, the undersigned, do hereby swear (or affirm) that this return (including any accompanying schedules and statements) has been examined by me/us, and to the best of my/our knowledge and belief is a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Internal Revenue Code, as amended, and the regulations issued under authority thereof.

Prepared and sworn to by Wanda L. Van Dusen

Sworn to this 15 day of March, 1940

By John Henry

Wanda L. Van Dusen

(Signature) (See Instruction E)

A return made by or for must be accompanied by power of attorney. (See Instruction E)

My Commission expires March 1, 1940 AFFIDAVIT. (See Instruction E)

(If this return was prepared for you by some other person, the following affidavit must be executed)

I, the undersigned, do hereby swear (or affirm) that I/we prepared this return for the person or persons named herein and that the return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the income tax liability of the person or persons for whom this return has been prepared of which I/we have any knowledge.

Prepared and sworn to before me this _____ day

of 1940

(Signature and title of officer administering oath)



(Signature of person preparing the return)

(Signature of person preparing the return)



CONSOLIDATED AIRCRAFT CORPORATION
LINDBERGH FIELD, SAN DIEGO, CALIF

UNITED STATES
INDIVIDUAL INCOME TAX RETURN
FORM 1040
YEAR 1939

C. A. VAN DUSEN AND WANDA V. VAN DUSEN.
3738 AMARYLLIS DRIVE, SAN DIEGO, CALIFORNIA

SCHEDULE E.

EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 13, 14 AND 15

	TOTAL	C. A. VAN DUSEN	WANDA V. VAN DUSEN
ITEM 13 - CONTRIBUTIONS:			
San Diego Community Chest	\$ 25.00	\$ 12.50	\$ 12.50
ITEM 14 - INTEREST PAID:			
Bank of America, note	\$1444.45	\$ 722.23	\$ 722.22
Baltimore National Bank, mortgage on dwelling house	750.00	375.00	375.00
California personal income tax deficiency assessment for the years 1935, 1936 and 1937	4.14	1.89	2.25
Federal personal income tax deficiency assessment for year 1936	19.39	4.06	14.53
Total	\$2217.98	\$ 1105.98	\$ 1114.00
ITEM 15 - TAXES:			
San Diego County personal property	\$ 36.99	\$ 18.49	\$ 18.50
Baltimore real estate tax - 1935	597.37	298.68	298.69
1936	540.94	270.47	270.47
Stock transfer tax	106.51	53.16	53.15
California personal income tax			
1935	6.95	6.95	
1936	24.10	6.55	18.55
1937	.78	.38	.38
1938	15.20	7.60	7.60
Federal tax on club dues			
LaJolla Country Club	10.80	5.40	5.40
Olympian Club	7.20	3.60	3.60
LaJolla Beach & Tennis Club	3.60	1.80	1.80
Bankers Club	2.25	1.12	1.13
Federal admission tax on theater tickets	5.00	2.50	2.50
Automobile license plates	13.50	6.75	6.75
Total	\$1569.43	681.67	687.76
ITEM 16 - Other deductions authorized by law:			
Membership fee - Institute of Aeronautical Science	\$ 10.00	5.00	5.00

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UNITED STATES NOT INVESTIGATED INCOME AND DEFENSE TAX RETURN 1940

Page 1

(Auditor's Stamp)

FOR GROSS INCOMES OF MORE THAN \$5,000 FROM SALARIES, WAGES, DIVIDENDS, INTEREST, ANNUITIES, AND FOR INCOMES FROM OTHER SOURCES REGARDLESS OF AMOUNTS

(Do not use these spaces)

REVIEWED
AUDIT REVIEW DIVISION

By: H. Rosen

DATE: APR 10 1942

For Calendar Year 1940

or fiscal year beginning 1940, and ended 1941

To be filed with the Collector of Internal Revenue for your district not later than the 15th day of the month following the close of your taxable year

PRINT NAME AND ADDRESS PLAINLY. (See Instruction C)

Wanda Y. Van Dusen

(Name) (Use given names of both husband and wife, if in community property state)

2626 Peinsettia Drive (Formerly 1738 Maryland Drive)

(Street and number, or rural route)

San Diego

(Post office)

San Diego

(County)

California

(State)

Cash—Check—M. O.

Post Payment

202468

RECEIVED
WITH REMITTANCE
MAR 13 1941
COLL. INT. REV.
LOS ANGELES, CALIF.

INCOME

1. Salaries and other compensation for personal services. (From Schedule A)
2. Dividends
3. Interest on bank deposits, notes, mortgages, etc.
4. Interest on corporation bonds
5. Taxable interest on Government obligations, etc. (From Schedule B)
6. Income (or loss) from partnerships, syndicates, pools, etc. (other than capital gains or losses)
(Provide names and addresses)
7. Income from fiduciaries. (Provide names and addresses)
8. Rents and royalties. (From Schedule C)
9. Income (or loss) from business or profession. (From Schedule D)
10. (a) Net short-term gain from sale or exchange of capital assets. (From Schedule F)
- (b) Net long-term gain (or loss) from sale or exchange of capital assets. (From Schedule F)
- (c) Net gain (or loss) from sale or exchange of property other than capital assets. (From Schedule G)
11. Other income (including income from annuities). (State amount)
12. Total income in items 1 to 11. (Enter ascertainable income in Schedule I)

DEDUCTIONS

13. Contributions paid. (Schedule to Schedule H)
14. Interest. (Schedule to Schedule H)
15. Taxes. (Schedule to Schedule H)
16. Losses from fire, storm, shipwreck, or other casualty, or theft. (Schedule to Schedule H)
17. Bad debts. (Schedule to Schedule H)
18. Other deductions authorized by law. (Schedule to Schedule H)
19. Total deductions in items 13 to 18

20. Net income (item 12 minus item 19) **or net income of husband, G. A. Van Dusen**

\$ 18,808 10

COMPUTATION OF TAX

21. Net income (item 20 above)	\$ 18,808 10	28. Normal tax (4% of item 27)	\$ 947 88
22. Less: Personal exemption. (From Schedule J-1)	\$ 1,800 00	29. Surtax on item 24. (See Instruction 29)	\$ 1,324 84
23. Credit for dependents. (From Schedule J-2)	1,800 00	30. Total (item 28 plus item 29)	\$ 1,981 84
24. Balance (surtax net income)	\$ 17,808 10	31. Total income tax (item 30, or if you had a net long-term capital gain or loss, enter item 10, Schedule F)	\$ 1,981 84
25. Less: Interest on Government obligations, etc. (See Instruction 25)	\$	32. LESS: Income tax paid at source	\$
26. Earned income credit. (From Schedule K-1 or K-2)	1,121 18	33. Income tax paid to a foreign country or U. S. possession. (Attach Form 1140)	
27. Balance subject to normal tax	\$ 16,181 97	34. Balance of income tax (item 31 minus items 32 and 33)	\$ 1,981 84
		35. Defense tax (10% of item 31). (See Instruction 35)	198 18
		36. Total income and defense taxes due (From 34 plus item 35)	\$ 2,180 02

NOTE—In order that this return may be accepted as meeting the requirements of the Internal Revenue Code, the data called for hereon must be set forth FULLY and CLEARLY.

E. X. G.



A.—INCOME RECEIVED FROM OTHERS CONSISTING OF SALARIES, WAGES, FEES, COMMISSIONS, BONUSES, AND OTHER COMPENSATION FOR PERSONAL SERVICES. (See Instruction 1)

1. Name of employer—If a governmental unit, indicate whether Federal, State, or Local	2. Amount	3. Expenses (deductible)	4. Amount
\$			\$

of column 2 minus total of column 4 (enter on item 1, page 1)

Schedule B.—INTEREST ON GOVERNMENT OBLIGATIONS, ETC. (See Instruction G)

1. Obligation or exemption	2. Amount owned at end of year including your proportionate share of such obligations held by estates, trusts, partnerships, or common trust funds	3. Interest received or accrued during the year	4. Amount of principal interest on which is exempt from taxation	5. Interest on amount in excess of exemption
of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions	\$	\$	All	XXXXXX XX
issued under Federal Farm Loan Act, or under such Act			All	XXXXXX XX
of United States issued on or before September 1, 1917			All	XXXXXX XX
Navy, Treasury Bills, and Treasury Certificates of Indebtedness			All	XXXXXX XX
State Savings Bonds and Treasury Bonds			\$5,000	\$
of indebtedness of the United States (other than those to be reported in (5) above)			None	
				\$

total (enter on item 5, page 1)

Schedule C.—INCOME FROM RENTS AND ROYALTIES. (See Instruction G)

1. Kind of property	2. Amount	3. Depreciation (explain in Schedule E)	4. Repairs (explain below)	5. Other expenses (explain below)	6. Net profit (column 2 minus sum of columns 3, 4, and 5) (enter on item 6, page 1)
\$	\$	\$	\$	\$	\$

of deductions claimed in columns 4 and 5

Schedule D.—PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION. (See Instruction G)

 of business (2) number of places of business (3) business name
 where if different from name and address on page 1
 type

1. Kind of business	2. Amount	3. Other business deductions	4. Net profit (or loss)
of goods sold		11. Salaries and wages not included as "Labor" (do not deduct compensation for yourself)	\$
on inventory on so inventories on hand		12. Interest on business indebtedness	\$
at beginning of year	\$	13. Taxes on business and business property	
also bought for sale		14. Losses (explain below)	
and supplies		15. Bad debts arising from sales or services	
in (explain below)		16. Depreciation, obsolescence, and depletion (explain in Schedule E)	
of item 2 to 6	\$	17. Rent, repairs, and other expenses (explain below or on separate sheet)	
at end of year		18. Total of items 11 to 17	\$
of goods sold (line 7 minus line 6)	\$	19. Net profit (or loss) (line 1 minus line 9 and 18) (enter on item 9, page 1)	\$
in (line 1 minus line 9)	\$		

production, manufacture, purchase and sale of merchandise in an income-producing factor, inventories are required. Enter "C," or "C or M," on line 2 and 8 to show for inventories are valued at cost, or cost or market, whichever is lower.

of deductions claimed in lines 6, 14, and 17

Schedule E.—EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES C, D, F, AND G

1. Kind of property (state material of which constructed)	2. Date acquired	3. Cost or other basis (do not include land or other nondepreciable property)	4. Asset fully depreciated by use at end of year	5. Depreciation claimed (or allowable) in prior years	6. Remaining cost or other basis to be recovered	7. Estimated life used in computing depreciation	8. Estimated life from beginning of year	9. Depreciation allowable this year
\$	\$	\$	\$	\$	\$	\$	\$	\$



Schedule F.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS. (See Instruction 10)

1. Kind of property (if necessary attach statement of descriptive details not shown below)	2. Date acquired Mo. Day Year	3. Date sold Mo. Day Year	4. Gross sales price (contract price)	5. Cost or other basis	6. Expenses of sale and cost of improvements subsequent to acquisition or March 1, 1913	7. Depreciation allowed (or allowable) after acquisition or March 1, 1913 (attach to Schedule E)	8. Gain or loss (column 4 plus column 7 minus the sum of columns 5 and 6)	9. Gain or loss to be taken into account	10. Amount
SHORT-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD NOT MORE THAN 18 MONTHS									
			\$	\$	\$	\$	\$	100	\$
								100	
								100	
								100	
Total net short-term capital gain or loss (enter in line 1, column 3, of summary below)									\$

			\$	\$	\$	\$	\$	66%	\$	
								66%		
								66%		
								66%		

			\$	\$	\$	\$	\$	50		
								50		
								50		
								50		
Total net long-term capital gain or loss (enter in line 2, column 3, of summary below)									\$	

SUMMARY OF CAPITAL NET GAINS OR LOSSES										
1. Classification	2. Net short-term capital loss of preceding taxable year that is carried over to this year	3. Net gain or loss to be taken into account from column 9, above		4. Net gain or loss to be taken into account from column 10, above		5. Total net gain or loss to be taken into account in column 2, A, add 4 of this summary		6. Rate		
		Gain	Loss	Gain	Loss	Gain	Loss			
Total net short-term capital gain or loss (enter on line 10 (a), page 1, amount of gain shown in column 3)	\$	\$	\$	\$	\$	\$	\$			
Total net long-term capital gain or loss (enter on line 10 (b), page 1, amount of gain or loss shown in column 3)	\$	\$	\$	\$	\$	\$	\$			

Use only (1) if you had a net long-term capital gain, and Form 24, page 7, exceeds \$22,000
OR if you had a net long-term capital loss, and such loss plus item 24, page 1, exceeds \$22,000

Net income (item 28, page 1). (See Instruction 10)	\$ 12,802.10	10. Normal tax (4% of line 9)	\$ 511.28
(a) Net long-term capital gain (item 10 (b), page 1)		11. Surtax on line 6. (See Instruction 29)	2,200.00
(b) Net long-term capital loss (item 10 (b), page 1)	106.81	12. Partial tax (line 10 plus line 11)	2,000.00
Ordinary net income (line 1 column line 3 (a) or line 1 plus line 2 (b)). (See Instruction 10)	\$ 12,695.29	13. (a) 30% of net long-term capital gain (9% of line 2 (a))	
Less: Personal exemption. (From Schedule J-1)	\$ 1,200.00	(b) 30% of net long-term capital loss (30% of line 2 (b))	
Credit for dependents. (From Schedule J-2)	-	14. Alternative tax (line 12 plus line 13 (a) or line 12 column line 13 (b))	2,000.00
Balance (before net income)	\$ 17,410.00	15. Total normal tax and surtax (item 32, page 1)	2,000.00
Less: Interest on Government obligations, etc. (See Instruction 25)	\$	16. Tax liability (if a net long-term capital gain on line 2 (a), enter line 14 or line 15, whichever is the lesser; if a net long-term capital loss on line 2 (b), enter line 14 or line 15, whichever is the greater). (Enter on item 34, page 1)	2,000.00
Earned income credit. (From Schedule K-1 or K-2). (See Inst. 10)	112,215		
Balance subject to normal tax	\$ 16,288.00		

Schedule G.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF PROPERTY OTHER THAN CAPITAL ASSETS (See Instruction 10)

1. Kind of property	2. Date acquired	3. Gross sales price (contract price)	4. Cost or other basis	5. Expenses of sale and cost of improvements subsequent to acquisition or March 1, 1913	6. Depreciation allowed (or allowable) after acquisition or March 1, 1913 (attach to Schedule E)	7. Gain or loss (column 3 plus column 5 minus the sum of columns 4 and 6)
		\$	\$	\$	\$	\$
Total net gain (or loss) (enter on item 10 (c), page 1)						

Indicate the family, fiduciary, or business relationship to you, if any, of purchaser of any of the items on this page
If any of such items were acquired by you other than by purchase, explain fully how acquired



Schedule H.—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 13, 14, 15, 16, 17, AND 18

Page 4

1. Item No.	2. Explanation	3. Amount	1. Item No. (Continued)	2. Explanation (Continued)	3. Amount (Continued)
		\$			\$

Schedule L.—NONTAXABLE INCOME OTHER THAN INTEREST REPORTED IN SCHEDULE B. (See Instruction C)

1. Source of income	2. Nature of income	3. Amount
		\$

Schedule J.—EXPLANATION OF CREDITS CLAIMED IN ITEMS 22 AND 23. (See Instructions 22 and 23)

(1) Personal Exemption			(2) Credit for Dependents		
Date	Number of dependents during the year in each status	Credit claimed	Name of dependent and relationship	Number of months during the year Under 18 years old Over 18 years old	Credit claimed
Single, or married and not living with husband or wife.		\$			\$
Married and living with husband or wife.	12	1,209.00			
Head of family (explain below).					
\$800.00 balance of personal exemption claimed by husband, G. A. Van Dusen			Reason for support if over 18 years old		

Schedule K.—COMPUTATION OF EARNED INCOME CREDIT. (See Instruction 24)

(1) If your net income is \$3,000 or less, use only this part of schedule	(2) If your net income is more than \$3,000, use only this part of schedule
Net income (Item 20, page 1)	of husband's salary
Earned income credit (10% of net income, above)	Earned net income (not more than \$14,000)
	Net income (Item 20, page 1)
	Earned income credit (10% of earned net income or 10% of net income, above, whichever amount is smaller, but do not enter less than \$300)

QUESTIONS

- State your principal occupation or profession. Housewife
- Check whether you are a citizen ☐ or a resident alien ☐.
- Did you file a return for any prior year? Yes. If so, what was the latest year? 1938. To which Collector's office was it sent? Los Angeles, Calif.
- Are there any income or deductions of both husband and wife included in this return? No
- State (a) Name of husband or wife if separate return was made G. A. Van Dusen
- Personal exemption, if any, claimed thereon \$800.00
- Collector's office to which it was sent Los Angeles, Cal.
- Check whether this return was prepared on the cash ☒ or accrual ☐ basis.
- Did you at any time during your taxable year own directly or indirectly any stock of a foreign corporation or a personal holding company as defined by section 501 of the Internal Revenue Code? (Answer "yes" or "no") No (If answer is "yes," attach statement required by Instruction J.)

AFFIDAVIT. (See Instruction E)

I/we swear (or affirm) that this return (including any accompanying schedules and statements) has been examined by me/us, and to the best of my/our knowledge and belief is a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Internal Revenue Code and the regulations issued under authority thereof.

Subscribed and sworn to by Wanda J. Van Dusen (Mrs.) Wanda J. Van Dusen
before me this 12 day of March, 1941.
Jane Frances Olson
(Signature and title of officer administering oath) Expires AUG. 7, 1942
A return made by an agent shall be accompanied by power of attorney. (See Instruction L)

AFFIDAVIT. (See Instruction E)

(If this return was prepared for you by some other person, the following affidavit must be executed)

I/we swear (or affirm) that I/we prepared this return for the person or persons named herein and that the return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the tax liability of the person or persons for whom this return has been prepared of which I/we have any knowledge.

Subscribed and sworn to before me this _____ day
of _____, 1941.



(Signature and title of officer administering oath)

U. S. GOVERNMENT PRINTING OFFICE 16-17284

(Signature of person preparing the return)

(Signature of person preparing the return)

(Place of firm or employer, if any)

GH



CONSOLIDATED AIRCRAFT CORPORATION
LINDBERGH FIELD, SAN DIEGO, CALIF.

UNITED STATES
INDIVIDUAL INCOME TAX RETURN
FORM 1040
YEAR 1940

C. A. VAN DUSEN AND WANDA V. VAN DUSEN.
2668 POINSETTIA DRIVE, SAN DIEGO, CALIFORNIA

SCHEDULE A
EXPLANATION OF DEDUCTIONS AND INCOME CLAIMED
IN ITEM 1

ITEM 1 - INCOME:

Consolidated Aircraft Corp., Lindbergh Field, San Diego, Cal. - Gross Salary	\$22,442.50
Aero Industries Technical Inst. - Director's fee	10.00
	<u>\$22,452.50</u>
Less California Unemployment Insurance tax	50.00
	<u>\$22,402.50</u>

SCHEDULE C
EXPLANATION OF DEDUCTIONS AND INCOME CLAIMED
IN ITEM 2

ITEM 2 - RENTS AND REVALUATING:

Northall, Inc. royalty on square shears	\$ 3,490.16
Expenses: (Column 5)	
3 trips to Los Angeles at \$50 each -	\$150.00
Square shear accounting service	100.00
" " draftsman "	10.00
	<u>260.00</u>
	\$3,160.16
Rental from dwelling house at 107 Upper Road, Baltimore, Maryland	\$1,230.00
Depreciation	\$1,435.00
Repairs	74.23
Maintenance tax	26.80
Commission	66.00
Legal fees	58.27
	<u>1,648.00</u>
	418.00
	<u>\$2,742.16</u>

LOSS



CONSOLIDATED AIRCRAFT CORPORATION
LINDBERGH FIELD, SAN DIEGO, CALIF.

UNITED STATES
INDIVIDUAL INCOME TAX RETURN
FORM 1040
YEAR 1940

C. A. VAN DUSEN AND WANDA V. VAN DUSEN,
2668 POINSETTIA DRIVE, SAN DIEGO, CALIFORNIA

SCHEDULE H
EXPLANATION OF DEDUCTIONS CLAIMED IN
ITEMS 13, 14, 15 and 16.

ITEM 13 - CONTRIBUTIONS:

San Diego Community Chest \$ 25.00

ITEM 14 - INTEREST:

Bank of America note \$1,230.00

Baltimore National Bank, mortgage on dwelling
house 750.00

\$1,970.00

ITEM 15 - TAXES:

San Diego County personal property \$ 40.82

Baltimore real estate tax 573.05

New York personal income tax deficiency
assessment for 1935 76.51

California personal income tax for 1939:

Wanda V. Van Dusen \$ 51.91

C. A. Van Dusen 52.12

104.03

Federal tax on club dues:

LaJolla Country Club 10.00

Cuyamaca Club 7.50

LaJolla Beach & Tennis Club 3.00

Bunkers Club of America 2.50

Federal Admission tax on theater tickets 5.00

Automobile licence plates \$ 13.15

12.72

25.97

\$ 845.35

ITEM 16 - OTHER DEDUCTIONS AUTHORIZED BY LAW:

Membership fee - Inst. of Aeronautical Sciences \$ 20.00

Legal fees in connection with defense of double

liability on Baltimore Trust Company stock 500.00

\$ 570.00



UNITED STATES
INDIVIDUAL INCOME TAX RETURN

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1941

(Auditor's Stamp)

OPTIONAL FORM 1040A MAY BE FILED INSTEAD OF THIS FORM IF GROSS INCOME IS NOT MORE THAN \$2,000 AND CONSISTS WHOLLY OF SALARIES, WAGES, OTHER COMPENSATION FOR PERSONAL SERVICES, DIVIDENDS, INTEREST, RENT, ANNUITIES, OR BENEFITS.

For Calendar Year 1941

or fiscal year beginning 1941, and ending 1942

To be filed with the Collector of Internal Revenue for your district not later than the 15th day of the 1st month following the close of your taxable year

PRINT NAME AND ADDRESS PLAINLY. (See Instructions on Form 1040)

Wanda Y. Van Dusen

(Please show names of both husband and wife, if this is a joint return)

2668 Poinsettia Drive

(Street and number, or rural route)

San Diego, San Diego, California

(Post office)

(County)

(State)

(Do not use these spaces)
E 2949
K 918487
MAR 16 1942
COLL. INT. REV.
LOS ANGELES, CALIF.

INCOME

Amount

Excludable Income

1. Salaries and other compensation for personal services, \$
2. Dividends
3. Interest on (A) bank deposits, notes, etc., \$; (B) corporation bonds, \$
4. Interest on Government obligations, etc.:
(a) From line (B), Schedule A, \$; (b) from line (f), Schedule A, \$
5. Rents and royalties. (See Schedule B)
6. Annuities

ITEMS 7, 8, AND 9, BELOW (AND PAGES 2 AND 3 HEREIN) SHOULD NOT BE CONSIDERED UNLESS YOU HAVE INCOME (OR LOSSES) IN ADDITION TO ITEMS ABOVE.

7. (a) Net short-term gain from sale or exchange of capital assets. (See Schedule F)
(b) Net long-term gain (or loss) from sale or exchange of capital assets. (See Schedule F)
(c) Net gain (or loss) from sale or exchange of property other than capital assets. (See Schedule G)
8. Net profit (or loss) from business or profession. (See Schedule H)
(State total receipts, from line 1, Schedule H, \$)
9. Income (or loss) from partnerships; fiduciary income; and other income. (See Schedule I)
10. Total income in items 1 to 9.

DEDUCTIONS

11. Contributions paid. (Schedule to Schedule C)
12. Interest. (Schedule to Schedule C)
13. Taxes. (Schedule to Schedule C)
14. Losses from fire, storm, shipwreck, or other casualty, or theft. (Schedule to Schedule C)
15. Bad debts. (Schedule to Schedule C)
16. Other deductions authorized by law. (Schedule to Schedule C)
17. Total deductions in items 11 to 16.
18. Net income (from item 10 minus item 17) of net income of husband, Van Dusen

COMPUTATION OF TAX

19. Net income (from item 18 above)	\$ 87,862.08	26. Normal tax (4% of item 29)	\$ 3,514.50
20. Less: Personal exemption. (See Schedule D-1)	\$ 200.00	27. Surtax on item 22. (See Instructions)	\$ 22,400.00
21. Credit for dependents. (See Schedule D-2)	800.00	28. Total (item 26 plus item 27)	\$ 25,914.50
22. Balance (surplus) net income	\$ 87,862.08	29. Total tax (from item 28 plus item 27)	\$ 29,424.50
23. Less: Item 4 (a) above	\$	30. Less: Income tax paid as shown	\$
24. Earned income credit. (See Schedule D-3 or D-4)	1,400.00	31. Income tax paid to foreign countries (See Form 114)	\$
25. Balance subject to normal tax	\$ 85,862.08	32. Balance of tax (from item 29 minus item 30 and item 31)	\$ 29,424.50

I (we) swear (or affirm) that this return (including any accompanying schedules and statements) has been made to the best of my (our) knowledge and belief is a true, correct, and complete return, made in good faith, for purposes of the Internal Revenue Code and the regulations issued under authority thereof.

Subscribed and sworn to by Wanda Y. Van Dusen Wanda Y. Van Dusen

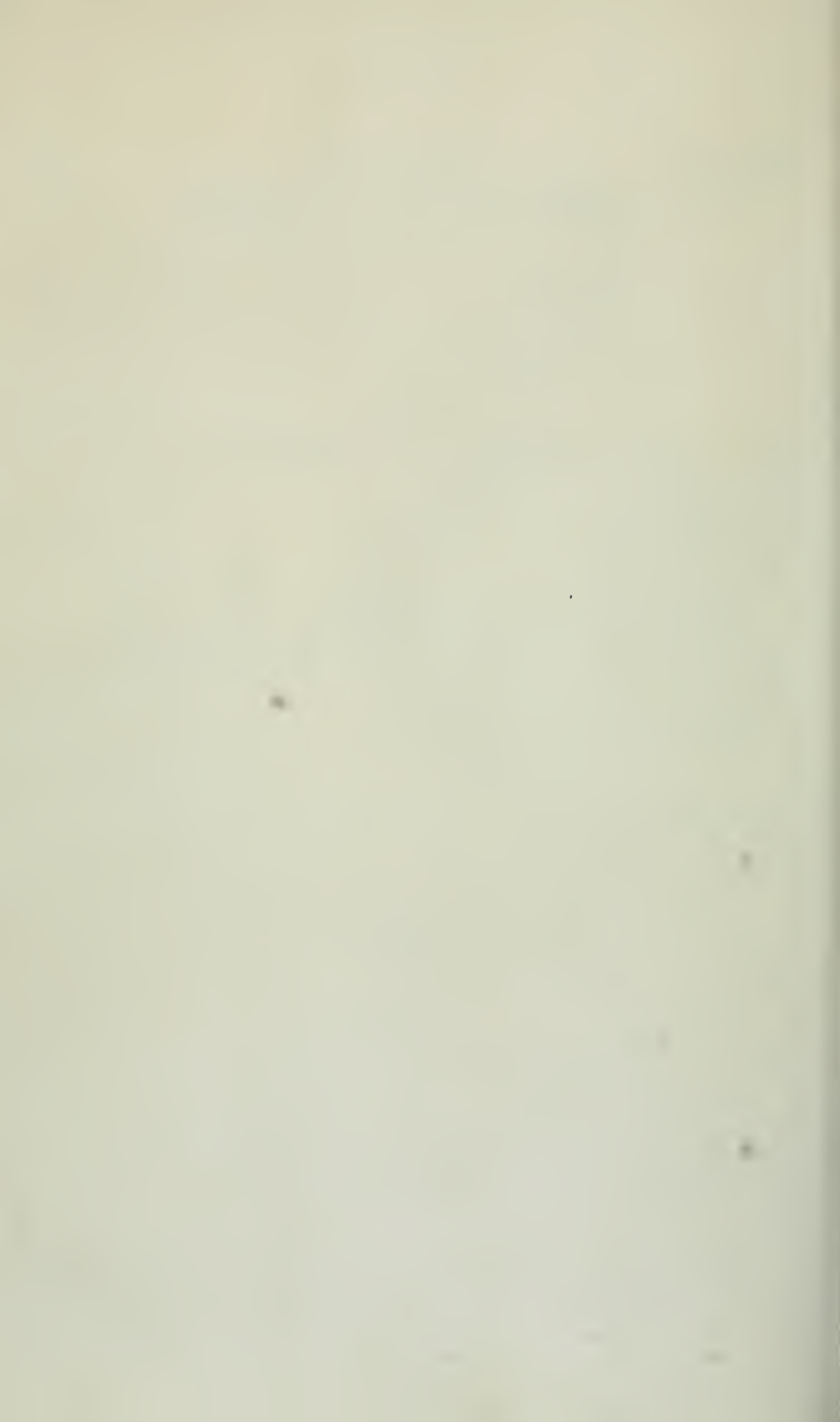
before me this 14 day of March 1942

Jan P. ...

A statement by an agent must be accompanied by power of attorney. (See Instructions B)

OF THIS RETURN WILL BE CONSIDERED FOR TWO BY SOME OTHER PERSONS, THIS STATEMENT OF THE FACTS IS REQUIRED BY COMMISSION EXPIRES AUG. 7, 1942.

EX. H.



Schedule A.—INTEREST ON GOVERNMENT OBLIGATIONS, ETC. (See Instruction G)

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1. Obligations or accounts	2. Amount owned at end of year including your proportionate share of such obligations held by estates, trusts, partnerships, or common trust funds	3. Interest received or accrued during the year	4. Amount of principal, interest on which is exempt from taxation	5. Interest on amount in excess of exemption, and dividends subject to surtax only
(a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions	\$.....	\$.....	All.....	.....
(b) Obligations issued prior to March 1, 1941, under Federal Farm Loan Act, or under such Act as amended	\$.....	\$.....	All.....	.....
(c) Obligations of United States issued on or before September 1, 1917	\$.....	\$.....	All.....	.....
(d) Treasury Notes, Treasury Bills, and Treasury Certificates of Indebtedness issued prior to March 1, 1941	\$.....	\$.....	All.....	.....
(e) United States Savings Bonds and Treasury Bonds issued prior to March 1, 1941	\$.....	\$.....	\$5,000	\$.....
(f) Obligations of instrumentalities of the United States (other than obligations to be reported in (b) above) issued prior to March 1, 1941	\$.....	\$.....	None	\$.....
(g) Dividends on share accounts in Federal savings and loan associations	\$.....	\$.....	\$.....	\$.....
(A) Total (enter as item 4 (a), page 1)	\$.....	\$.....	\$.....	\$.....

1. Obligations issued on or after March 1, 1941, by the United States or any agency or instrumentality thereof (enter amount of interest on item 4 (b), page 1)	Amount owned at end of year	Interest received or accrued during the year (subject to normal tax and surtax)
\$.....	\$.....	\$.....

Schedule B.—INCOME FROM RENTS AND ROYALTIES. (See Instruction 5)

1. Kind of property	2. Amount	3. Depreciation or depletion (attach schedule)	4. Repairs (explain below)	5. Other expenses (explain below)	6. Net profit (columns 2 minus sum of columns 3, 4, and 5 (enter on item 5, page 1))
\$.....	\$.....	\$.....	\$.....	\$.....	\$.....

Explanation of deductions claimed in columns 4 and 5.....

Schedule C.—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 11, 12, 13, 14, 15, AND 16

1. Item No.	2. Explanation	3. Amount	1. Item No. (Continued)	2. Explanation (Continued)	3. Amount (Continued)
.....	\$.....	\$.....

Schedule D.—EXPLANATION OF CREDITS CLAIMED IN ITEMS 20 AND 21. (See Instructions 20 and 21)

(1) Personal Exemption			(2) Credit for Dependents		
Status	Number of months during the year in which claimed	Credit claimed	Name of dependent and relationship	Number of months during the year Under 18 years old 18 years or over	Credit claimed
Single, or married and not living with husband or wife, and not head of family	.....	\$.....	.....	.....	\$.....
Married and living with husband or wife	12	900.00	.....	.....	\$.....
Head of family (explain below)	.....	\$.....	.....	.....	\$.....
\$800.00 balance of personal exemption claimed by husband, C. A. Van Dusen			Reason for support if 18 years or over.....		

Schedule E.—COMPUTATION OF EARNED INCOME CREDIT. (See Instruction 24)

(1) If your net income is \$9,000 or less, use only this part of schedule	(2) If your net income is more than \$9,000, use only this part of schedule
Net income (Item 18, page 1) \$.....	Earned net income (not more than \$14,000) \$.....
Earned income credit (10% of net income, above) \$.....	Net income (Item 18, page 1) \$.....
	Earned income credit (10% of earned net income or 10% of net income, above, whichever amount is smaller, but do not enter less than \$300) \$.....
	1,400.00

QUESTIONS

- State your principal occupation or profession Housewife
- Name and address of employer
- Did you file a return for any prior year? Yes. If so, what was the latest year? 1940. To which Collector's office was it sent? Los Angeles, Calif.
- If separate return was made for the current year, state:
 - Name of husband or wife C. A. Van Dusen
 - Principal occupation, if any, claimed thereon 800.00
 - Collector's office to which it was sent Los Angeles, Cal.
- Check whether this return was prepared on the cash ☒ or accrual ☐ basis.
- If return on cash basis, do you elect, under section 41, to include or exclude received in the current year the increase for current and prior years in the redemption price of noninterest-bearing obligations issued at a discount? No. If so, attach statement listing obligations owned and computation of the accrued interest. Report such income as interest in item 3 or 4, page 1, whichever applicable.
- Did you receive during the taxable year any substantial income other than interest reported in Schedule A (see Instruction G)? No. If so, attach schedule showing source, nature, and amount of such income.
- Did you at any time during your taxable year own directly or indirectly any stock of a foreign corporation or a personal holding company as defined by section 501 of the Internal Revenue Code? No. If so, attach statement required by Instruction J.

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DETACH PAGES 3 AND 4 IF NOT USED

Page 2

Schedule F.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF CAPITAL ASSETS. (See Instruction 7)

1. Kind of property (if necessary, attach statement of descriptive details not shown below)	2. Date acquired Mo. Day Year	3. Date sold Mo. Day Year	4. Gross sales price (contract price)	5. Cost or other basis	6. Expenses of sale and cost of improvements subsequent to acquisition or March 1, 1913	7. Depreciation allowed (or allowable) since acquisition or March 1, 1913 (explain on Schedule J)	8. Gain or loss (column 4 plus column 7 minus the sum of columns 5 and 6)	9. Per centage	10. Amount
SHORT-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD NOT MORE THAN 18 MONTHS									
			\$	\$	\$	\$		100	\$
								100	
								100	
								100	
Total net short-term capital gain or loss (enter in line 1, column 3, of summary below)									\$

LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 18 MONTHS BUT NOT FOR MORE THAN 24 MONTHS

			\$	\$	\$	\$		66 2/3	\$
								66 2/3	
								66 2/3	
								66 2/3	

LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 24 MONTHS

			\$	\$	\$	\$		50	
								50	
								50	
								50	

Total net long-term capital gain or loss (enter in line 2, column 3, of summary below)

SUMMARY OF NET CAPITAL GAINS OR LOSSES

1. Classification	2. Net short-term capital loss of preceding taxable year (not in excess of net income for such year)	3. Net gain or loss to be taken into account from column 10, above		4. Net gain or loss to be taken into account from partnerships and common trust funds		5. Total net gain or loss to be taken into account on columns 2, 3, and 4 of this summary	
		Gain	Loss	Gain	Loss	Gain	Loss
1. Total net short-term capital gain or loss (enter on item 7 (c), page 1, amount of gain shown in column 5)	\$	\$	\$	\$	\$	\$	No net loss allowable (see Instruction 7)
2. Total net long-term capital gain or loss (enter on item 7 (d), page 1, amount of gain or loss shown in column 5)	\$	\$	\$	\$	\$	\$	\$

COMPUTATION OF ALTERNATIVE TAX

Use only: If you had a net long-term capital gain, and item 22, page 1, exceeds \$12,000, or

If you had a net long-term capital loss, and such loss plus item 22, page 1, exceeds \$12,000

1. Net income (Item 16, page 1). (See Instruction 7)	\$ 57,962.05	10. Normal tax (4% of line 9)	\$ 1,805.93
2. (a) Net long-term capital gain (Item 7 (f), page 1)	\$ 210,513.85	11. Surtax on line 6. (See Instruction 27)	\$ 17,481.51
(b) Net long-term capital loss (Item 7 (f), page 1)		12. Partial tax (line 10 plus line 11)	\$ 19,287.44
3. Ordinary net income (line 1 minus line 2 (a) or line 1 plus line 2 (b)). (See Instruction 7)	\$ 47,448.20	13. (a) 30% of net long-term capital gain (30% of line 2 (a))	\$ 3,154.00
4. Less: Personal exemptions. (From Schedule D-1)	\$ 900.00	(b) 30% of net long-term capital loss (30% of line 2 (b))	
5. Credit for dependents. (From Schedule D-2)	900.00	14. Alternative tax (line 12 plus line 13 (a) or line 12 minus line 13 (b))	\$ 22,441.60
6. Balance (surtax net income)	\$ 46,548.20	15. Total normal tax and surtax (Item 28, page 1)	\$ 25,631.85
7. Less: Item 4 (a), page 1	\$	16. Tax liability (if a net long-term capital gain, on line 2 (a), enter line 14 or line 15, whichever is the lower; if a net long-term capital loss, on line 2 (b), enter line 14 or line 15, whichever is the greater). (Enter on item 29, page 1)	\$ 22,441.60
8. Earned income credit. (From Schedule E-1 or E-2. (See Inst. 7))	\$ 2,400.00		
9. Balance subject to normal tax	\$ 45,148.20		

Schedule G.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF PROPERTY OTHER THAN CAPITAL ASSETS (See Instruction 7)

1. Kind of property	2. Date acquired	3. Gross sales price (contract price)	4. Cost or other basis	5. Expenses of sale and cost of improvements subsequent to acquisition or March 1, 1913	6. Depreciation allowed (or allowable) since acquisition or March 1, 1913 (explain on Schedule J)	7. Gain or loss (column 3 plus column 6 minus the sum of columns 4 and 5)
		\$	\$	\$	\$	
Total net gain (or loss) (enter on item 7 (c), page 1)						\$

State the family, fiduciary, or business relationship to you, if any, of purchaser of any of the items on this page:

If any of such items were acquired by you other than by purchase, explain fully how acquired:

• Remaining half Net long-term capital gain claimed by husband, C. A. Van Dusen



Schedule H.—PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION. (See Instruction 8)

(State (1) nature of business _____; (2) number of places of business _____; (3) business name and address if different from name and address on page 1 _____)

1. Total receipts _____ \$

COST OF GOODS SOLD

(To be used where inventories are an income-determining factor)

2. Inventory at beginning of year _____ \$
 3. Merchandise bought for sale _____
 4. Labor _____
 5. Material and supplies _____
 6. Other costs (specify below) _____
 7. Total of lines 2 to 6 _____ \$
 8. Less inventory at end of year _____
 9. Net cost of goods sold (line 7 minus line 8) _____ \$
 10. Gross profit (line 1 minus line 9) _____ \$

OTHER BUSINESS DEDUCTIONS

11. Salaries and wages not included as "Labor" (do not deduct compensation for yourself) _____ \$
 12. Interest on business indebtedness _____
 13. Taxes on business and business property _____
 14. Losses (explain below) _____
 15. Bad debts arising from sales or services _____
 16. Depreciation, obsolescence, and depletion (explain in Schedule J) _____
 17. Rent, repairs, and other expenses (specify below or on separate sheet) _____
 18. Total of lines 11 to 17 _____ \$
 19. Total of lines 9 and 18 _____ \$
 20. Net profit (or loss) (line 1 minus line 19) (enter as item 8, page 1) _____ \$

If the production, manufacture, purchase, or sale of merchandise is an income-producing factor, inventories are required. Enter "C," "C or M," or "M," on lines 2 and 8 to indicate whether inventories are valued at cost, or cost or market, whichever is lower.

Explanation of deductions claimed in lines 6, 14, and 17 _____

Schedule I.—INCOME FROM PARTNERSHIPS, FIDUCIARIES, AND OTHER SOURCES

INCOME (OR LOSS) FROM PARTNERSHIPS, SYNDICATES, ETC. (SEE INSTRUCTION 9 (a)) (FURNISH NAMES AND ADDRESSES)

\$ _____
 \$ _____

INCOME FROM FIDUCIARIES (FURNISH NAMES AND ADDRESSES)

\$ _____
 \$ _____

INCOME FROM OTHER SOURCES (STATE NATURE)

\$ _____
 \$ _____

Total amounts in Schedule I. (Enter as item 9, page 1) _____ \$

Schedule J.—EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES F, G, AND H

1. Kind of property (If buildings, state number of which constructed)	2. Date acquired	3. Cost or other basis (Do not include land or other nondepreciable property)	4. Assets fully depreciated in use at end of year	5. Depreciation allowed (or allowable) in prior years	6. Remaining cost or other basis to be recovered	7. Estimated life used in computing depreciation	8. Estimated remaining life from beginning of year	9. Depreciation allowable this year
		\$ _____	\$ _____	\$ _____	\$ _____			\$ _____
		\$ _____	\$ _____	\$ _____	\$ _____			\$ _____
		\$ _____	\$ _____	\$ _____	\$ _____			\$ _____
		\$ _____	\$ _____	\$ _____	\$ _____			\$ _____

AFFIDAVIT. (See Instruction E)

(If this return was prepared for you by some other person, the following affidavit must be executed)

I/we swear (or affirm) that I/we prepared this return for the person or persons named herein and that the return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the tax liability of the person or persons for whom this return has been prepared of which I/we have any knowledge.

Subscribed and sworn to before me this _____ day
 of _____, 194_____



(Signature of person preparing the return)

(Signature of person preparing the return)

(Signature and title of officer administering oath)

(Name of firm or employer, if any)

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LONG-TERM CAPITAL GAINS AND LOSSES - ASSETS HELD FOR MORE THAN 24 MONTHS

1. Kind of property	2. Date acquired	3. Date sold	4. Gross sales price (contract price)	5. Cost or other basis	8. Gain or loss	9. Per-cent- age	10. Amount
---------------------	------------------	--------------	---------------------------------------	------------------------	-----------------	---------------------	------------

1) 0 shs. Consolidated Aircraft Corp.
Common Stock

100 shs.	5/29/36	7/3/41	\$30,173.79	\$5,000.00	\$25,173.79	50	\$12,586.88
100 " Same	7/1/36	"	30,361.22	20,703.15	9,658.07	50	4,829.04
100 " "	2/2/37	"					
200 shs. same	3/9/37	12/22/41	8,223.56	1,000.00	7,223.56	50	3,611.78
200 " "	4/30/37						\$21,027.70

Total net long-term capital gain or loss

\$42,055.42

\$21,027.70

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UNITED STATES
INDIVIDUAL INCOME TAX RETURN
FORM 1040
YEAR 1941

C. A. VAN DUSEN AND WANDA V. VAN DUSEN,
2668 POINSETTIA DRIVE, SAN DIEGO, CALIFORNIA

SCHEDULE C
EXPLANATION OF DEDUCTIONS CLAIMED IN
ITEMS 11, 12, 13, and 16.

ITEM 11 - CONTRIBUTIONS:		
San Diego Community Chest	\$ 250.00	
British War Relief	15.00	
		\$ 265.00
ITEM 12 - INTEREST:		
Bank of America note	\$ 509.45	
Baltimore National Bank, mortgage on dwelling house	750.00	
		1,259.45
ITEM 13 - TAXES:		
San Diego County Personal Property Tax	\$ 73.77	
San Diego Light Post Tax	2.56	
San Diego County taxes on property at 2668 Poinsettia Drive, San Diego, Calif.	369.25	
Real property tax on property at 167 Upnor Road, Baltimore, Maryland	494.30	
California personal income tax - 1940:		
Wanda V. Van Dusen	\$310.07	
C. A. Van Dusen	310.07	
		620.14
Federal tax on club dues:		
La Jolla Country Club	\$ 8.24	
Guyanasa Club	7.92	
La Jolla Beach & Tennis Club	5.94	
Bankers Club of America	2.25	
		24.35
Federal Admission tax on amusement tickets	5.00	
Automobile license plates (4 cars)	70.23	
Transfer tax on sale of securities	12.20	
		1,671.80
ITEM 16 - OTHER DEDUCTIONS AUTHORIZED BY LAW:		
Membership fee - Inst. of Aeronautical Sciences	10.00	
		<u>\$3,206.25</u>

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UNITED STATES
INDIVIDUAL INCOME TAX RETURN
FORM 1040
YEAR 1941

C. A. VAN DUSEN AND WANDA V. VAN DUSEN,
2608 POINSETTIA DRIVE, SAN DIEGO, CALIFORNIA

SCHEDULE A
EXPLANATION OF DEDUCTIONS AND INCOME CLAIMED
IN ITEM 1

ITEM 1 - INCOME:

Consolidated Aircraft Corp., Lindbergh Field, San Diego, Cal. - Gross Salary	\$ 31,255.00
Wreck, Lilienthal & Company - Consulting Services (Finder's Fee - Rahr Aircraft Corp., San Diego, California)	8,319.37
Aero Industries Technical Inst. - Director's fee	10.00
	<u>\$ 39,584.37</u>
Less California Unemployment Insurance tax	30.00
	<u>\$ 39,554.37</u>

SCHEDULE B
EXPLANATION OF DEDUCTIONS AND INCOME CLAIMED
IN ITEM 5

ITEM 5 - ESTATE AND REALTIES:

Northall, Inc. royalty on square shoes	\$ 4,961.32
Expenses (Column 5)	
2 trips to Los Angeles at \$20 each - (\$40.00)	
Square shoe accounting service	<u>100.00</u>
	250.00
	\$ 4,711.32
 Rental from dwelling house at 107 Union Road, Baltimore, Maryland	 \$ 1,455.00
Depreciation	\$1,455.00
Repairs	14.35
Maintenance tax	26.50
Legal fees	<u>27.00</u>
	\$ 1,493.25
	<u>1905</u>
	58.25
	<u>\$ 4,673.67</u>

EXPLANATION OF DEPRECIATION
COLUMN 5 OF SCHEDULE B

Kind of property	2. Year acquired	3. Cost	4. Depreciation allowed prior yrs.	5. Remaining cost	6. Estd. Life	7. Rem. Life
Dwelling house at 107 Union Road, Baltimore.	1939	\$28,500.00	\$9,540.00	\$19,960.00	20	13

Depreciation allowable this year

\$1,455.00



The Tax Court of the United States

8 T. C. No. 47

Docket Nos. 5210, 5211

WANDA V. VAN DUSEN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

C. A. VAN DUSEN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Promulgated February 24, 1947

FINDINGS OF FACT AND OPINION

Held, petitioner earned taxable income when, pursuant to an option given petitioner by the president of a corporation of which corporation petitioner was an employee, petitioner purchased from the president personally, at less than market price, stock of the corporation, the difference in value of the stock from market value being compensation for services rendered or to be rendered.

Raymond M. Wansley, C.P.A., and John M. Cranston, Esq., for the petitioners.

E. A. Tonjes, Esq., for the respondent.

The respondent determined deficiencies in income taxes of these petitioners as follows: [93]

Petitioner	Year	Deficiency
Wanda V. Van Dusen.....	1939	\$ 527.73
Wanda V. Van Dusen.....	1940	1,251.02
Wanda V. Van Dusen.....	1941	4,804.30
C. A. Van Dusen.....	1938	310.66
C. A. Van Dusen.....	1939	528.22
C. A. Van Dusen.....	1940	1,251.02
C. A. Van Dusen.....	1941	4,863.30

The question presented is whether petitioner C. A. Van Dusen earned income by the bargain purchase of certain stock from the president of a corporation personally, he being an employee of the corporation.

Findings of Fact

Most of the facts were stipulated, the stipulation being in substantially the following form:

C. A. Van Dusen, hereinafter sometimes called petitioner, and Wanda V. Van Dusen were husband and wife, and were residents of the State of California throughout each of the years 1938, 1939, 1940 and 1941.

On December 10, 1934, the petitioner entered the employ of Consolidated Aircraft Corporation as factory manager at a salary of \$9,000 per annum, pursuant to an oral agreement entered into on December 7, 1934.

The petitioner received salary from Consolidated Aircraft Corporation as follows:

Year	Salary
1938	\$15,205.04*
1939	16,020.08
1940	22,442.50
1941	31,255.00

The petitioner and his wife filed separate income tax returns for the calendar years 1938, 1939, 1940 and 1941.

On December 7, 1934, R. H. Fleet, president of Consolidated Aircraft Corporation, gave to the petitioner an oral option for the purchase of stock of Consolidated Aircraft Corporation, which option was reduced to writing on December 10, 1934, and was terminated by written agreement on December 31, 1941, said written option and termination being in the following words and figures:

Consolidated Aircraft Corporation
Buffalo, New York

R. H. Fleet,
President.

December 10, 1934.

Mr. Charles A. Van Dusen, (Confidential)

Dear Van:

In connection with your employment this day by our company, it gives me much pleasure to confirm my offer to sell you fifty (50) shares of my personal common stock in this corpora-

*\$8,601.01 of his salary for 1938 was exempt from taxation because received for foreign service. [94]

tion at the price of \$5 net per share each and every month for the next ten years, (unless I die or cease to be an employee of Consolidated, in which event this is modified against me or my estate to five years from this date), this right to hold, however, only so long as you are retained in the company's employ.

You are under no obligation to purchase or to hold after purchase, any such stock under this offer; failing to purchase any month you forfeit nothing but the right to buy that month's quota of 50 shares.

So that you may get prompt delivery of any shares you purchase hereunder, I will leave sufficient of my shares, in street names, properly endorsed, with the Treasurer of the company to fulfill this agreement. [95]

Until I further advise, would prefer that if you sell you do so only to or thru our brokers, Hammons & Company, 120 Broadway, New York City, (phone Rector 2-4400).

Cordially,

/s/ R. H. FLEET.

RHF-B

It is mutually agreed that the foregoing agreement is to terminate on December 31, 1941.

/s/ R. H. FLEET,

/s/ CHARLES A. VAN DUSEN.

Dated: San Diego, Cal., December 15, 1941.

On December 7, 1934, the common stock of Consolidated Aircraft Corporation sold on the New York Curb Exchange for a high of $9\frac{1}{2}$ and a low of $8\frac{7}{8}$.

The price ranges of the common stock of Consolidated Aircraft Corporation on the New York Curb Exchange for the years 1932, 1933, and 1934 were as follows:

Year	High	Low
1932	$4\frac{3}{4}$	1
1933	12	1
1934	$12\frac{7}{8}$	$6\frac{3}{8}$

The common stock of Consolidated Aircraft Corporation had a par value of \$1.00 per share, and a book value of \$3.55 per share at December 7, 1934.

There were 574,400 shares of the common stock of Consolidated outstanding on December 7, 1934, and R. H. Fleet owned 261,481 shares of the common stock on that date. [96]

The total number of shares of common and preferred stock outstanding on January 1, 1938, and December 31, 1938, December 1, 1939, December 1, 1940, and December 31, 1941, and the highest number of shares owned by R. H. Fleet during the years 1938, 1939, 1940 and 1941, were as follows:

Capital stock outstanding:	Shares Preferred	Shares Common
January 1, 1938.....	23,708	574,760
December 31, 1938.....	23,820	574,760
December 31, 1939.....	23,820	576,160
December 31, 1940.....	23,820	578,605
December 31, 1941.....	None	1,284,244

During the year 1941, 514 shares of preferred stock were retired at \$55 per share and 23,306 shares were converted into common at rate of two shares common for each share of preferred.

The stock owned by R. H. Fleet was as follows:

Year	Preferred	Common
1938	6,000	164,841
1939	6,010	164,241
1940	6,010	162,791
1941	6,010	348,822

The petitioner purchased common stock of Consolidated from R. H. Fleet, under the terms of the agreement set forth above, as follows:

Year	Shares	Market value when purchased.	Cost
1938	600	\$10,653.75	\$3,000.00
1939	750	14,484.38	3,750.00
1940	400	9,875.00	2,000.00
1941	600	18,000.00	3,000.00

At all times from December 7, 1934, to December 31, 1941, the petitioner was an employee of Consolidated Aircraft Corporation. [97]

R. H. Fleet claimed no deductions from gross income in his returns for the calendar years 1938, 1939, 1940 and 1941 for the difference between the fair market value of the common stock of Consolidated and the sale price of the common stock to petitioner, but reported as income in his returns for

said years the difference between the basis of the stock to him and the sum of \$5 per share received on the sales to petitioner.

Consolidated Aircraft Corporation claimed on its returns as deductions from gross income for the years 1938, 1939, 1940 and 1941 only the salary paid by it to the petitioner for those years and did not claim any deduction with regard to the sales of its stock by R. H. Fleet to the petitioner during those years.

From the testimony in the case we find as follows:

The option was given to petitioner by Fleet as an inducement to secure his services for Consolidated. The termination clause was inserted because a termination of employment would terminate petitioner's usefulness to Consolidated and to Fleet. The difference between the amount paid for the stock and its fair market value at the several dates of purchase was in the nature of compensation for services rendered or to be rendered by petitioner.

The Commissioner added to the income of each petitioner for the several taxable years certain amounts called "compensation for services" with the following explanation:

This represents your community half of income within the meaning of section 22 (a) of the Internal Revenue Code, received as compensation for services as a result of the purchase of Consolidated Aircraft Corporation stock from Mr. R. H. Fleet at less than its fair market value. [98]

Opinion

Van Fossan, Judge: The question here posed is whether petitioner received income under the scope of section 22 (a), Internal Revenue Code, when, pursuant to the option contract set out in the facts, he purchased stock of Consolidated from Fleet, its president.

The definition of income contained in section 22 (a) is extremely broad. In fact, it would be difficult to contrive a definition broader in scope or more all-embracing in concept. Income may be in the form of cash or of property.

The Commissioner has promulgated Regulations 103, section 19.22(a)-1 in interpretation of section 22 (a), Internal Revenue Code. In any case where the requirements laid down by the regulations are satisfied, it may properly be said that income is earned. But our question is not limited to determining whether the excess value was income under the regulations. Section 22 (a), Internal Revenue Code, is the touchstone by which income is gauged. Of section 22 (a) the Supreme Court, speaking through the Chief Justice, in *Commissioner vs. Smith*, 324 U. S. 177, has said: "Section 22 (a) of the Revenue Act is broad enough to include in taxable income any economic or financial benefit conferred on the employee as compensation, whatever the form or mode by which it is effected." (Emphasis supplied.)

Our concern centers first on the facts giving rise to the option agreement which was entered into De-

ember 7, 1934, at the same time petitioner was employed to work for Consolidated. The testimony of Fleet as [99] to the employment and the nature of the option is illuminative of his attitude toward the same. The following are excerpts:

Q. Do you recall the salary that was to be paid?

A. I think it was \$10,000.00 a year. That is '34. Let's see. I think it was \$10,000.00 a year and he to take down 50 shares of my stock a month for \$5.00 a share for the next ten years, or for ten years immediately following, conditioned upon his remaining in the employ of Consolidated Aircraft Corporation.

* * *

Q. Do you recall whether or not the matter of giving Mr. Van Dusen this option to purchase was made a part of the original proposition to him?

A. I think it was.

* * *

Q. You also felt, did you not, Mr. Fleet, that the option which you gave Mr. Van Dusen would be regarded as something of an additional inducement to enter the employ of Consolidated?

A. I think so.

* * *

Q. But the motivating influence on your part of giving this privilege was to have Mr. Van Dusen work for Consolidated, wasn't it?

A. That's right.

Fixing our attention on the option agreement

itself, it will be noted that in the opening paragraph the parties recognized in so many words the intimate relation of the option to petitioner's employment. The language used,—“In connection with your employment this day by our company, it gives me much pleasure to confirm my offer to sell you fifty (50) shares of my personal common stock” and “this right to hold, however, only so long as you are retained in the company's employ,” all speaks in terms of inducement or consideration for the employment of petitioner. [100]

Fleet was president of Consolidated and a large holder of its stock. As such he was personally and financially interested in the success and growth of the company. Petitioner was able to obtain the stock only by engaging in the employment and only so long as he remained in the employ of the company, i.e., only by performing his duties and rendering services to the company. If his employment ceased the opportunity to buy the stock also ceased. Thus it is there was a vital causal connection between petitioner's employment and his rendition of services and the purchase of the stock at favorable prices. If Fleet had agreed to pay petitioner \$100 per month so long as he remained in the employ of Consolidated there would scarcely be any basis to question the fact that such payment would have been income to petitioner. Likewise if, under otherwise similar facts, Fleet had transferred the shares each month without any payment so long as petitioner remained an employee of Consolidated, of a cer-

tainty petitioner would have received income measured by the value of the shares.

We must look at the case from the position of the petitioner. Bearing in mind the observation of the Supreme Court in *Commissioner vs. Smith*, *supra*, did he receive any economic or financial benefit from the exercise of the option? Was the benefit connected with, or conditioned on, rendering services and thus connected with his employment? Was the benefit a gift by Fleet? The answers seem to be obvious. Petitioner clearly benefited by exercising the option and securing the stock at less than market prices. The benefit was directly connected with, and [101] conditioned on, the rendition of services and thus depended on his employment. The benefit was not a gift by Fleet,—it was based on the consideration of petitioner entering and continuing in the employ of Consolidated. Clearly the “economic or financial benefit” gained by petitioner from the exercise of the option falls within the broad scope of the language of section 22 (a), Internal Revenue Code, as elucidated by the Supreme Court.

Whether petitioner was serving two masters or whether Fleet was acting solely for himself or as a representative of the company in the negotiations which lead to the giving of the option contract, we need not decide. The facts bring the gain within the expansive scope of section 22 (a). Each case turns on its facts. Close analysis of the facts in the decided cases, together with their chronology

with reference to Commissioner vs. Smith, *supra*, will serve to distinguish or render obsolete as authority the cases relied on by petitioner.

Reviewed by the Court.

Decision will be entered under Rule 50.

[Seal]

The Tax Court of the United States
Washington

Docket No. 5211

C. A. VAN DUSEN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the report of this Court promulgated February 24, 1947, the respondent in the above-entitled proceeding filed a proposed computation of tax on March 19, 1947, and the case having been called for hearing on April 30, 1947, at which time no objection was offered by the petitioner to the respondent's computation, it is

Ordered and Decided: That there are deficiencies in income tax as follows:

Year	Deficiency
1938	\$ 310.66
1939	528.22
1940	1,251.02
1941	4,863.30

[Seal] /s/ J. E. MURDOCK,
 Judge.

Entered May 1, 1947.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 5211

C. A. VAN DUSEN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REVIEW

To the Honorable Judges of the United States Circuit Court of Appeals, for the Ninth Circuit:

Now comes C. A. Van Dusen, petitioner on review in the above-entitled proceeding, by his attorneys, John M. Cranston and James L. Chapman, and respectfully shows:

I.

Nature of the Controversy

In 1934, petitioner entered the employ of Consolidated Aircraft Corporation as Factory Manager. At the time petitioner entered the employ of Consolidated, R. H. Fleet, President of Consolidated, gave to petitioner an option for the purchase from said R. H. Fleet, of stock of Consolidated Aircraft Corporation. Said option provided that petitioner could acquire fifty (50) shares per month of Consolidated Stock owned by [104] R. H. Fleet personally for Five Dollars (\$5.00) net per share. Petitioner exercised his option and purchased stock from R. H.

Fleet in the years 1938, 1939, 1940 and 1941. The Commissioner of Internal Revenue asserted deficiencies in income tax against petitioner for said years. Said deficiencies are based on the theory that petitioner received compensation for services as a result of purchase of Consolidated Aircraft Corporation stock from R. H. Fleet at less than its fair market value. The petitioner filed an appeal from said notice of deficiencies with the Tax Court of the United States, and on February 24, 1947, the Tax Court promulgated its opinion herein and on May 1, 1947, entered its decision sustaining the deficiencies asserted by the Commissioner of Internal Revenue for the years 1938, 1939, 1940 and 1941.

II.

Jurisdiction

Petitioner seeks a review of the decision of the Tax Court of the United States in the above-entitled proceeding by the United States Circuit Court of Appeals, for the Ninth Circuit.

Petitioner is an individual and resident of the City of San Diego, State of California; petitioner filed his Federal Income Tax Returns for the years 1938, 1939, 1940 and 1941 (which are the years involved in the above-entitled proceeding) with the Collector of Internal Revenue at Los Angeles, California.

Petitioner seeks a review of the decision of the Tax Court of the United States pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

Wherefore, C. A. Van Dusen petitions that said opinion and decision of the Tax Court of the United States be reviewed by the United States Circuit Court of Appeals, for the Ninth Circuit; that a transcript of the record be prepared in [105] accordance with the law and rules of said Court and be transmitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that said opinion and decision may be reviewed by said Court.

JOHN M. CRANSTON,
JAMES L. CHAPMAN,
Attorneys for C. A. Van
Dusen, Petitioner.

[Endorsed]: Filed T.C.U.S. June 20, 1947. [106]

[Title of Circuit Court of Appeals and Cause.]

NOTICE OF FILING PETITION FOR
REVIEW

To: Charles Oliphant, Acting Chief Counsel,
Bureau of Internal Revenue.

You are hereby notified that C. A. Van Dusen did, on the 20th day of June, 1947, file with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of this Court heretofore rendered in the above-entitled case. Copy of the petition for review as filed is hereto attached and served upon you.

Dated this 2nd day of July, 1947.

/s/ VICTOR S. MERSCH,
Clerk, The Tax Court of the
United States.

Service of copy of Petition for Review acknowledged this July 2, 1947.

/s/ CHARLES OLIPHANT,
Bureau of Internal Revenue,
Attorney for Respondent.

[Endorsed]: Filed T.C.U.S., July 2, 1947. [107]

[Title of Circuit Court of Appeals and Cause.]

NOTICE OF FILING PETITION
FOR REVIEW

To: Commissioner of Internal Revenue,
Washington, D. C.

You Are Hereby Notified: That C. A. Van Dusen did, on the 20th day of June, 1947, file with the Clerk of the Tax Court of the United States, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals, for the Ninth Circuit, of the decision of the Tax Court heretofore rendered in the above-entitled case. A copy of the petition for review is hereto attached and served upon you.

Dated: This 25th day of June, 1947.

/s/ JOHN M. CRANSTON,

/s/ JAMES L. CHAPMAN,

Attorneys for C. A. Van

Dusen, Petitioner. [109]

[Affidavit of service by mail attached.]

[Endorsed]: Received T.C.U.S., July 7, 1947.

[Title of Circuit Court of Appeals and Cause.]

NOTICE OF FILING PETITION FOR
REVIEW

To: J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, Washington, D. C.:

You Are Hereby Notified: That C. A. Van Dusen did, on the 20th day of June, 1947, file with the Clerk of the Tax Court of the United States, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals, for the Ninth Circuit, of the decision of the Tax Court heretofore rendered in the above-entitled case. A copy of the petition for review is hereto attached and served upon you.

Dated: This 25th day of June, 1947.

/s/ JOHN M. CRANSTON,

/s/ JAMES L. CHAPMAN,

Attorneys for C. A. Van
Dusen, Petitioner.

[Affidavit of service by mail attached.]

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS TO BE RELIED
UPON

Now Comes C. A. Van Dusen, petitioner on review in the above-entitled cause, by and through his attorneys John M. Cranston and James L. Chapman, and hereby states that he intends to rely upon the following points in this proceeding:

That the Tax Court of the United States erred:

1. In holding and deciding that the difference between the amount paid for the stock and its fair market value at the time the option for purchase was exercised constituted or was in the nature of compensation for services rendered, or to be rendered, by C. A. Van Dusen;

2. In holding that the difference between the amount paid for the stock and its fair market value at the time the option for purchase was exercised constituted or was income, one-half of which was chargeable to petitioner; [112]

3. In determining what constitutes taxable income by reference to the provisions of the Internal Revenue Code alone, without considering regulations promulgated by the Commissioner of Internal Revenue and the effect of such regulations upon sections of the code which are subsequently re-enacted;

4. In holding that it is immaterial whether C. A. Van Dusen was an employee of R. H. Fleet;

5. In failing to hold that no income was received by either C. A. Van Dusen or Wanda V. Van Dusen from the exercise of the option for the purchase of stock.

/s/ JAMES L. CHAPMAN,

/s/ JOHN M. CRANSTON,

Attorneys for C. A. Van
Dusen, Petitioner.

[Endorsed]: Received and filed T.C.U.S., July
14, 1947. [113]

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PORTIONS OF RECORD,
PROCEEDINGS AND EVIDENCE TO BE
CONTAINED IN RECORD ON REVIEW

To the Clerk of the Tax Court of the United States:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Ninth Circuit, heretofore filed by petitioner above named:

1. Docket entries of proceedings before the Tax Court;
2. Pleadings before the Tax Court:
 - (a) Petition;
 - (b) Answer;

3. Stipulation of Facts filed with the Tax Court;
4. Opinion of the Tax Court promulgated February 24, 1947; [114]
5. Decision of the Tax Court entered May 1, 1947;
6. Petition for Review, together with Proof of Service of notice of filing petition for review and of service of copy of petition for review;
7. Statement of points to be relied upon;
8. Any and all orders made by the Court with respect to enlargement of time for the preparation and transmission of the record on review;
9. This designation of portions of records, proceedings and evidence to be contained in the record on review.

Said transcript to be prepared, certified and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

JAMES L. CHAPMAN,

JOHN M. CRANSTON,

Attorneys for C. A. Van
Dusen, Petitioner.

[Endorsed]: Received and filed July 14, 1947.

The Tax Court of the United States
Washington

Docket No. 5211

C. A. VAN DUSEN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CERTIFICATE

I, Victor S. Mersch, clerk of The Tax Court of the United States, do hereby certify that the foregoing pages, 1 to 115, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 25th day of July, 1947.

[Seal] /s/ VICTOR S. MERSCH,

Clerk, The Tax Court of the
United States.

[Endorsed]: No. 11699. United States Circuit Court of Appeals for the Ninth Circuit. C. A. Van Dusen, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of The Tax Court of the United States.

Filed July 29, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit

In the United States
Circuit Court of Appeals
For the Ninth Circuit

C. A. VAN DUSEN, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On petition for review of the decision of the Tax
Court of the United States

Brief for the Petitioner

JAMES L. CHAPMAN,

JOHN M. CRANSTON,

Bank of America Building,
San Diego, California,

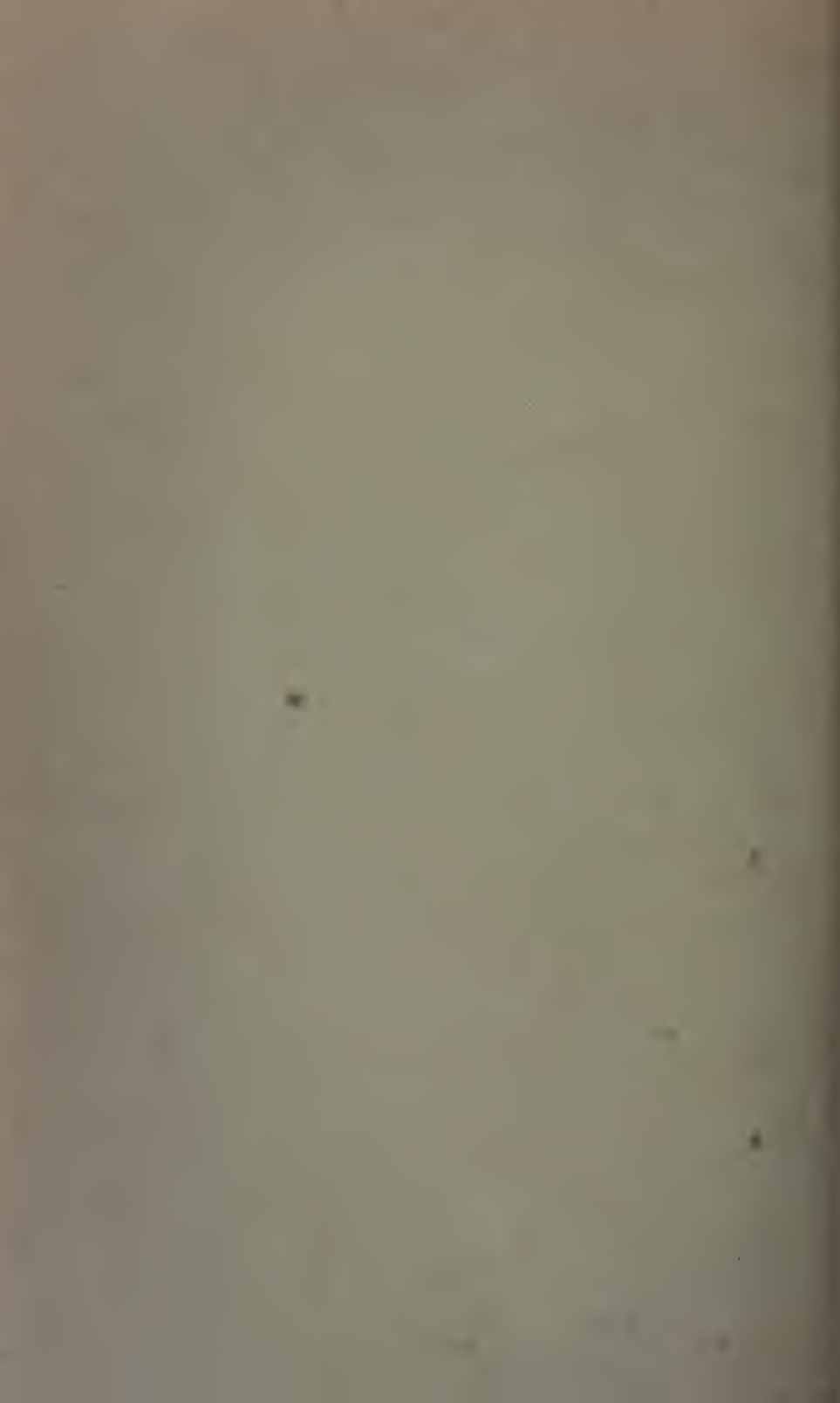
Attorneys for the Petitioner.

FILED

NOV 17 1947

PAUL P. O'BRIEN,

CLERK



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IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

No. 11,699

C. A. VAN DUSEN, PETITIONER

v's.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**On petition for review of the decision of the Tax
Court of the United States**

Brief for the Petitioner

OPINION BELOW

The opinion of the Tax Court of the United States (R. 95-106.) may be found in 8 T. C. 388.

JURISDICTION

The petition for review involves deficiencies in income taxes as follows:

Year	Deficiency
1938	\$ 310.66
1939	528.22
1940	1,251.02
1941	4,863.30

Said deficiencies are set forth in the decision of the Tax Court entered May 1, 1947. (R. 107.) The taxpayer filed his income tax returns for the years in question with the Collector of Internal Revenue for the Sixth Collection District of California. (R. 30-92.) On March 10, 1944, the Commissioner mailed a statutory notice of deficiency to the taxpayer. (R. 9-18.) On June 5, 1944, the taxpayer filed a petition with the Tax Court for redetermination of his income tax liability pursuant to Section 272(a)(1) of the Internal Revenue Code. (R. 2-18.) The final order and decision of the Tax Court deciding that there were deficiencies in income tax was entered on May 1, 1947. (R. 107.) The petition for review of the Tax Court decision by the Circuit Court of Appeals for the Ninth Circuit was filed June 20, 1947 (R. 108-110.), pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

QUESTION PRESENTED

Whether petitioner realized taxable income in 1938, 1939, 1940 and 1941 at the times of exercise of a continuing option to purchase stock of a corporation, of which corporation petitioner was an employee, when the option was not given by and the purchases were not made from the employer corporation but by and from the corporation's president personally, and when the option had value at the time it was given to petitioner on December 7, 1934.

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1934, C 277, 48 Stat. 680:

"Section 22. Gross Income.

"(a) General Definition.—'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. In the case of Presidents of the United States and judges of courts of the United States taking office after June 6, 1932, the compensation received as such shall be included in gross income; and all Acts fixing the compensation of such Presidents and judges are hereby amended accordingly."

Article 22, Regulations 86:

"(a)-1. What included in gross income.—Gross income includes in general compensation for personal and professional services, business income, profits from sales of and dealings in property, interest, rent, dividends, and gains, profits, and income derived from any source whatever, unless exempt from tax by law. * * * In general, income is the gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets. Profits of citizens, residents, or domestic corporations derived from sales in foreign commerce must be included in their gross income; but special provisions are made for nonresident aliens by sections 211-214 and, in certain cases, by section 251, for citizens and domestic corporations

deriving income from sources within possessions of the United States. Income may be in the form of cash or of property. As to dividends, whether in cash or in property, see section 115.

"If property is transferred by a corporation to a shareholder, or by an employer to an employee, for an amount substantially less than its fair market value, such shareholder of the corporation or such employee shall include in gross income the difference between the amount paid for the property and the amount of its fair market value. In computing the gain or loss from the subsequent sale of such property its cost shall be deemed to be its fair market value at the date of acquisition by the shareholder or the employee. This paragraph does not apply, however, to the issuance by a corporation to its shareholders of the right to subscribe to its stock, as to which see article 22(a)-8."

* * *

"(a)-2. Compensation for personal services.— Commissions paid salesmen, compensation for services on the basis of a percentage of profits, commissions on insurance premiums, tips, pay of persons in the military or naval forces of the United States, retired pay of Federal and other officers, and pensions or retiring allowances paid by private persons or by the United States are income to the recipients; as are also marriage fees, baptismal offerings, sums paid for saying masses for the dead, and other contributions received by a clergyman, evangelist, or religious worker for services rendered. However, so-called pensions awarded by one to whom no services have been rendered are mere gifts or gratuities and are not taxable. The salaries of Federal officers and employees are subject to tax. See article 116-2 as to compensation of State officers and employees."

"(a)-3. Compensation paid other than in cash.— If services are paid for with something other than money, the fair market value of the thing taken in

payment is the amount to be included as income. If the services were rendered at a stipulated price, in the absence of evidence to the contrary such price will be presumed to be the fair value of the compensation received. If a corporation transfers to its employees its own stock as compensation for services rendered by the employee, the amount of such compensation to be included in the gross income of the employee is the fair market value of the stock at the time of the transfer. If living quarters such as camps are furnished to employees for the convenience of the employer, the ratable value need not be added to the cash compensation of the employees, but if a person receives as compensation for services rendered a salary and in addition thereto living quarters, the value to such person of the quarters furnished constitutes income subject to tax."

STATEMENT

The relevant facts as stipulated (R. 23-29.) and as found by the Tax Court are as follows: On December 10, 1934, C. A. Van Dusen, petitioner herein, entered the employ of Consolidated Aircraft Corporation as factory manager at a salary of \$9,000 per annum. (R. 96.) At all times from December 7, 1934, to December 31, 1934, petitioner was the employee of Consolidated Aircraft Corporation. (R. 100.) On December 7, 1934, R. H. Fleet was president of Consolidated Aircraft Corporation. (R. 97.) On December 7, 1934, R. H. Fleet gave to petitioner an oral option to purchase stock of Consolidated Aircraft Corporation from Fleet (R. 97.), and on December 10, 1934, said option was reduced to writing. (R. 97.) Said written option was as follows:

"Consolidated Aircraft Corporation
Buffalo, New York

R. H. Fleet,
President.

December 10, 1934.

Mr. Charles A. Van Dusen, (Confidential)
Dear Van:

In connection with your employment this day by our company, it gives me much pleasure to confirm my offer to sell you fifty (50) shares of my personal common stock in this corporation at the price of \$5 net per share each and every month for the next ten years (unless I die or cease to be an employee of Consolidated, in which event this is modified against me or my estate to five years from this date), this right to hold, however, only so long as you are retained in the company's employ.

You are under no obligation to purchase or to hold after purchase, any such stock under this offer; failing to purchase any month you forfeit nothing but the right to buy that month's quota of 50 shares.

So that you may get prompt delivery of any shares you purchase hereunder, I will leave sufficient of my shares, in street names, properly endorsed, with the Treasurer of the company to fulfill this agreement.

Until I further advise, would prefer that if you sell you do so only to or thru our brokers, Hammons & Company, 120 Broadway, New York City, (phone Rector 2-4400).

Cordially,
/s/ R. H. FLEET"

On December 15, 1941 it was mutually agreed between Fleet and petitioner that the option agreement would terminate on December 31, 1941. (R. 98.)

The common stock of Consolidated Aircraft Corporation had a par value of \$1 per share and a book value of \$3.55 per share at December 7, 1934. (R. 99.) On Decem-

ber 7, 1934 the common stock of Consolidated Aircraft Corporation sold on the New York Curb Exchange for a high of $9\frac{1}{2}$ and a low of $8\frac{7}{8}$. (R. 99.) The option price was \$5 per share. (R. 98.) There were 574,400 shares of the common stock of Consolidated outstanding on December 7, 1934 and R. H. Fleet owned 261,481 shares of the common stock on that date. (R. 99.) Petitioner purchased common stock of Consolidated from R. H. Fleet under the terms of the agreement set forth above as follows (R. 100.):

Year	Shares	Market value when purchased.	Cost
1938	600	\$10,653.75	\$3,000.00
1939	750	14,484.38	3,750.00
1940	400	9,875.00	2,000.00
1941	600	18,000.00	3,000.00

R. H. Fleet claimed no deductions from gross income in his returns for the calendar years 1938, 1939, 1940, 1941 for the difference between the fair market value of the common stock of Consolidated and the sale price of the common stock to petitioner, but reported as income in his returns for said years the difference between the basis of the stock to him and the sum of \$5 per share received on the sales to petitioner. (R. 100-101.)

Consolidated Aircraft Corporation claimed on its returns as deductions from gross income for the years 1938, 1939, 1940 and 1941 only the salary paid by it to the petitioner for those years and did not claim any deduction on account of the sales of its stock by R. H. Fleet to the petitioner during those years. (R. 101.)

The Tax Court has found that the option was given to petitioner by Fleet as an inducement to secure his services for Consolidated. (R. 100.) Furthermore, the Tax Court has purported to find that the difference between the amount paid for the stock and its fair market value at the several dates of purchase was in the nature of compensation for services rendered or to be rendered by petitioner. (R. 101.) The Tax Court has held that petitioner realized taxable income at the times of purchase of the stock pursuant to the option in an amount equal to the difference between the price paid by petitioner and the market value of the stock at the dates of purchase.

STATEMENT OF POINTS TO BE URGED

The petitioner's assignments of error, all of which are here relied upon, appear in the Record at pages 114-115. They may be summarized by the simple statement that the Tax Court erred in holding that petitioner realized taxable income at the time of purchasing the stock pursuant to the terms of the option.

SUMMARY OF ARGUMENT

The purported finding of the Tax Court that the difference between the amount paid for the stock and its fair market value at the several dates of purchase was in the nature of compensation for services rendered or to be rendered by the petitioner is in reality a conclusion of law which is subject to judicial review, and is a conclusion which is not supported by law or fact.

Assuming *arguendo* that the option was compensation

to petitioner, since the option had value at the date it was given, petitioner realized income upon receipt of the option and not at the dates of purchase of the stock as held by the Tax Court.

ARGUMENT

The purported finding of the Tax Court that the difference between the amount paid for the stock and its fair market value at the several dates of purchase was in the nature of compensation to petitioner is a conclusion of law not supported by law or fact.

The Tax Court has based its decision upon the expansive scope of Section 22(a) and the decision of the Supreme Court in *Commissioner v. Smith*, 324 U. S. 177. However, it should be noted that the Tax Court has not found that petitioner was the employee of Fleet from whom the Consolidated stock was purchased, nor has the Tax Court found that Fleet was acting for and on behalf of Consolidated in granting the option. On the contrary, the Tax Court has found that petitioner was the employee of Consolidated (R. 100.), and that petitioner purchased the stock from Fleet (R. 100.). *Commissioner v. Smith, supra*, is distinguishable on its facts from the instant case in that the option in the *Smith* case was granted by an employer to an employee, while in the instant case the Tax Court has not found that an employer-employee relationship existed between Fleet, the grantor of the option, and petitioner, and in fact such relationship did not exist.

The Tax Court has purported to find that the option was in the nature of compensation for services rendered or to be rendered by petitioner. This purported finding of the Tax Court is actually a conclusion of law to be distinguished from true findings of primary evidentiary or circumstantial facts. It is subject to review and on such review the Court may substitute its judgment for that of the Tax Court. (*Bogardus v. Commissioner*, 302 U. S. 34, 38, 39.) There is no basis in law or in fact for the holding of the Tax Court that petitioner acquired the stock as compensation for services. The only services petitioner rendered were to his employer, Consolidated, for which he was fully compensated by salary. (R. 96-97.) Petitioner was not the employee of Fleet, the seller of the stock, nor did petitioner render services to Fleet. Petitioner acquired the Consolidated stock from Fleet by purchase pursuant to an option, and realized no income at the time of such purchase.¹ Since petitioner was not the employee of Fleet, *Commissioner v. Smith*, *supra*, upon which the Tax Court mainly based its opinion is clearly distinguishable.

The decisive factor which determines the question of whether petitioner realized taxable income out of the receipt of the option or the purchase of stock is the intention of the grantor. (*Bogardus v. Commissioner*, *supra*; *Palmer v. Commissioner*, 302 U. S. 63.) If Fleet intended to compensate petitioner, petitioner realized taxable income. However, if Fleet did not intend to compensate no taxable in-

¹*Bothwell v. Commissioner*, 10 Cir., 77 F. 2d 35; *Rossheim v. Commissioner*, 3 Cir., 92 F. 2d 247; *Hawke v. Commissioner*, 9 Cir., 109 F. 2d 946. See, also, *Gardner-Denver Co. v. Commissioner*, 7 Cir., 75 F. 2d 38; *Omaha Nat. Bank v. Commissioner*, 8 Cir., 75 F. 2d 434.

come was realized.¹ In *Palmer v. Commissioner, supra*, a corporation gave its stockholders the right to purchase stock which it owned in another corporation. The stockholder was held to have realized no income, either upon the receipt of the right or upon the exercise, even though the right had value at both times. The court emphasized the absence of an intention to distribute anything of value. The court held that since the directors did not intend to distribute anything at the time the corporation adopted the plan, it was immaterial that the right had value at the time of distribution and exercise of the rights. Moreover, the Commissioner in his brief before the Supreme Court in *Commissioner v. Smith, supra*, has recognized that the intention of the grantor of an option or the vendor in a bargain purchase is determinative of whether income is realized by the purchaser.²

The decisive question is did Fleet, the grantor of the option, intend to compensate petitioner. While Fleet, the grantor of the option, may have intended to benefit petitioner and Consolidated, it does not follow that he intended to compensate petitioner. The intention of the grantor to induce action in the grantee by conferring a benefit does not make the benefit taxable income to the grantee. (*Ed-*

¹Cf. Article 22(a)-2 Regulations 86, *supra*: * * * "However, so-called pensions awarded by one to whom no services have been rendered are mere gifts or gratuities and are not taxable." * * *

²The Commissioner said in his *Smith* case brief: "While the Regulations contain no further definition of compensation, there is a strong presumption that all gains flowing from the employer-employee relationship are in the nature of compensation. This may not always be true so far as bargain purchases are concerned. Conceivably such a bargain may occur where an employer can find no other buyer in a stagnant market, or even where the sole purpose is to ensure the employee's unflagging loyalty by giving him a stake in the employer's business."

wards v. Cuba Railroad, 268 U. S. 628; *Bogardus v. Commissioner*, *supra*; *Helvering v. American Dental Co.*, 318 U. S. 322, 331; *McDermott v. Commissioner*, CCA, D. C., 150F(2) 585; *Pauline C. Washburn*, 5 T. C. 1333.) Since petitioner was not the employee of Fleet, and since petitioner rendered no services to Fleet, there is no basis in law or in fact for the Tax Court's conclusion that the option was in the nature of compensation for services rendered by petitioner.¹

Assuming *Arguendo* that petitioner received the option as compensation for services rendered or to be rendered, petitioner realized income in the year in which the option was granted and not in the year of purchase of the stock.

Petitioner's option to purchase Consolidated stock provided that he might purchase from Fleet 50 shares of Fleet's stock per month for a period of ten years at a price of \$5 per share. (R. 97-98.)² On the day the option was given to petitioner the common stock of Consolidated Aircraft sold on the New York Curb Exchange for a high of 9½ and a low of 8⅞. (R. 99.) It is clear that at the time the option was granted it had value. The Supreme Court in *Commissioner v. Smith*, *supra*, based its decision upon the

¹Fleet took no deduction for compensation paid in his income tax returns on account of the option or sale. (R. 100-101.) If he had intended to compensate petitioner such deduction would have been claimed. Since no deduction was claimed, and since such deduction would have resulted in a substantial tax saving to Fleet this is a strong indication that Fleet did not intend to compensate petitioner.

²The option was noncumulative and terminated if petitioner left the employ of Consolidated; furthermore, the option extended for five years only if Fleet died or left the employ of Consolidated.

fact that in that case the option had no value at the time it was granted. The court expressly pointed out at page 181 of its decision: "When the option price is less than the market price of the property for the purchase of which the option is given, it may have present value and may be found to be itself compensation for services rendered." And again at page 182 the Supreme Court states: "It of course does not follow that in other circumstances not here present the option itself, rather than the proceeds of its exercise, could not be found to be the only intended compensation."

The Tax Court has completely ignored the basis of the Supreme Court's decision in the *Smith* case. In the instant case the Tax Court has found facts which clearly establish that the option had value at the time it was granted. Assuming *arguendo* the validity of the Tax Court's purported finding that the option was intended to be compensation to petitioner, since the option had value at the time it was granted the only taxable income realized by petitioner was the value of the option when received by petitioner. The Tax Court has erred in holding that petitioner received income at the times that purchases were made pursuant to the option. We submit that there is no reasonable basis for wholly disregarding the finding of fact that the market price exceeded the option price by a substantial amount at the time the option was granted. Since the market price of the stock exceeded the option price at the time the option was granted, if compensation was intended as purportedly found by the Tax Court, petitioner realized income in the year the option was granted and not in the years the option was exercised as determined by the Tax Court. The con-

clusion of the Tax Court ignores its own finding of fact and is directly contrary to the Supreme Court's decision in *Commissioner v. Smith, supra*.

CONCLUSION

The Tax Court erred in holding that there are deficiencies in petitioner's income taxes for the years 1938, 1939, 1940 and 1941. Its decision should be reversed.

Respectfully submitted,

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No. 11699

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

C. A. VAN DUSEN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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FILED

DEC 21 1917

PAUL F. O'BRIEN, CLERK



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BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Tax Court (R. 102-106) is reported in 8 T. C. 388.

JURISDICTION

This petition for review (R. 108-110) involves federal income tax for the years 1938-1941 in the total amount of \$6,953.20 (R. 107). Notice of deficiency was mailed the petitioner by the Commissioner of Internal Revenue on March 10, 1944 (R. 9); and within ninety days thereafter, June 5, 1944, petitioner filed a petition with the Tax Court for a redetermination under the provisions of Section 272 of the Internal Revenue Code (R. 4-18). The decision of the Tax Court was entered May 1, 1947. (R. 107.) The case is brought to this Court by a petition for review filed June 20, 1947 (R. 108-110), pursuant to the pro-

visions of Sections 1141 and 1142 of the Internal Revenue Code.

QUESTION PRESENTED

Whether the Tax Court erred in determining that taxpayer received income, within the meaning of Section 22 (a) of the Internal Revenue Code, through his bargain purchases of shares in a corporation of which he was an employee, pursuant to option granted him by the corporation's president, whose personal holdings they were.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code:

SEC. 22. GROSS INCOME.

(a) [As amended by Sec. 1, Public Salary Tax Act of 1939, c. 59, 53 Stat. 574] *General Definition*.—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property;

* * * * *

(26 U. S. C. 1940 ed., Sec. 22.)

Treasury Regulations 103, promulgated under the Internal Revenue Code:

SEC. 19.22 (a)-1. WHAT INCLUDED GROSS INCOME.—Gross income includes in general com-

compensation for personal and professional services, business income, profits from sales of and dealings in property, interest, rent dividends, and gains, profits, and income derived from any source whatever, unless exempt from tax by law. (See sections 22 (b) and 116.) In general, income is the gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets.

* * * * *

If property is transferred by a corporation to a shareholder, or by an employer to an employee, for an amount substantially less than its fair market value, regardless of whether the transfer is in the guise of a sale or exchange, such shareholder or employee shall include in gross income the difference between the amount paid for the property and the amount of its fair market value to the extent that such difference is in the nature of (1) compensation for services rendered or to be rendered * * *

STATEMENT

The facts were found by the Tax Court in accordance with the parties' stipulation and from testimony of witnesses, and are as follows (R. 96-101):

C. A. Van Dusen, hereinafter called the taxpayer, and Wanda V. Van Dusen were husband and wife, and were residents of the State of California throughout each of the years 1938, 1939, 1940 and 1941. (R. 96.)¹

¹ The taxpayer and his wife filed separate income tax returns for the calendar years 1938, 1939, 1940, and 1941. (R. 97.) The Commissioner assessed similar deficiencies against the wife, and

On December 10, 1934, the taxpayer entered the employ of Consolidated Aircraft Corporation as factory manager at a salary of \$9,000 per annum, pursuant to an oral agreement entered into on December 7, 1934. (R. 96.)

The taxpayer received salary from Consolidated Aircraft Corporation as follows (R. 96-97):

	<i>Salary</i>
1938-----	¹ \$15, 205. 04
1939-----	16, 020. 08
1940-----	22, 442. 50
1941-----	31, 255. 00

¹ \$8,601.01 of his salary for 1938 was exempt from taxation because received for foreign service.

On December 7, 1934, R. H. Fleet, president of Consolidated Aircraft Corporation, gave to the taxpayer an oral option for the purchase of stock of Consolidated Aircraft Corporation, which option was reduced to writing on December 10, 1934, and was terminated by written agreement on December 31, 1941, the written option and termination being in the following words and figures (R. 97-98):

CONSOLIDATED AIRCRAFT CORPORATION

BUFFALO, NEW YORK

R. H. Fleet, President

DECEMBER 10, 1934.

MR. CHARLES A. VAN DUSEN, (Confidential).

DEAR VAN: In connection with your employment this day by our company, it gives me much pleasure to confirm my offer to sell you fifty (50) shares of my personal common stock

she was a petitioner below. It has now been stipulated that the wife's case shall be governed by the decision in this one.

in this corporation at the price of \$5 net per share each and every month for the next ten years, (unless I die or cease to be an employee of Consolidated, in which event this is modified against me or my estate to five years from this date), this right to hold, however, only so long as you are retained in the company's employ.

You are under no obligation to purchase or to hold after purchase, any such stock under this offer; failing to purchase any month you forfeit nothing but the right to buy that month's quota of 50 shares.

So that you may get prompt delivery of any shares you purchase hereunder, I will leave sufficient of my shares, in street names, properly endorsed, with the Treasurer of the company to fulfill this agreement.

Until I further advise, would prefer that if you sell you do so only to or thru our brokers, Hammons & Company, 120 Broadway, New York City, (phone Rector 2-4400).

Cordially,

(S) R. H. FLEET.

RHF-B.

It is mutually agreed that the foregoing agreement is to terminate on December 31, 1941.

(S) R. H. FLEET.

(S) CHARLES A. VAN DUSEN.

Dated: San Diego, Cal., December 15, 1941.

On December 7, 1934, the common stock of Consolidated Aircraft Corporation sold on the New York Curb Exchange for a high of $9\frac{1}{2}$ and a low of $8\frac{7}{8}$. (R. 99.)

The price ranges of the common stock of Consolidated Aircraft Corporation sold on the New York Curb Exchange for the years 1932, 1933, and 1934 were as follows (R. 99):

Year	High	Low
1932.....	4¾	1
1933.....	12	1
1934.....	127½	63½

The common stock of Consolidated Aircraft Corporation had a par value of \$1 per share, and a book value of \$3.55 per share at December 7, 1934. (R. 99.)

There were 574,400 shares of the common stock of Consolidated outstanding on December 7, 1934, and R. H. Fleet owned 261,481 shares of the common stock on that date. (R. 99.)

The total number of shares of common and preferred stock outstanding on January 1, 1938, and December 31, 1938, December 1, 1939, December 1, 1940, and December 31, 1941, and the highest number of shares owned by R. H. Fleet during the years 1938, 1939, 1940 and 1941, were as follows (R. 99):

Capital stock outstanding—	Shares preferred	Shares common
Jan. 1, 1938.....	23, 708	574, 760
Dec. 31, 1938.....	23, 820	574, 760
Dec. 31, 1939.....	23, 820	576, 160
Dec. 31, 1940.....	23, 820	578, 605
Dec. 31, 1941.....	None	1, 284, 244

During the year 1941, 514 shares of preferred stock were retired at \$55 per share and 23,306 shares were

converted into common at rate of two shares common for each share of preferred. (R. 100.)

The stock owned by R. H. Fleet was as follows (R. 100) :

Year	Preferred	Common
1938.....	6,000	164,841
1939.....	6,010	164,241
1940.....	6,010	162,791
1941.....	6,010	348,822

The taxpayer purchased common stock of Consolidated from R. H. Fleet, under the terms of the agreement set forth above, as follows (R. 100) :

Year	Shares	Market value when purchased	Cost
1938.....	600	\$10,653.75	\$3,000.00
1939.....	750	14,484.38	3,750.00
1940.....	400	9,875.00	2,000.00
1941.....	600	18,000.00	3,000.00

At all times from December 7, 1934, to December 31, 1941, the taxpayer was an employee of Consolidated Aircraft Corporation. (R. 100.)

R. H. Fleet claimed no deductions from gross income in his returns for the calendar years 1938, 1939, 1940 and 1941 for the difference between the fair market value of the common stock of Consolidated and the sale price of the common stock to taxpayer, but reported as income in his returns for those years the difference between the basis of the stock to him and the sum of \$5 per share received on the sales to taxpayer. (R. 100-101.)

Consolidated Aircraft Corporation claimed on its returns as deductions from gross income for the years 1938, 1939, 1940 and 1941 only the salary paid by it to the taxpayer for those years and did not claim any deduction with regard to the sales of its stock by R. H. Fleet to the taxpayer during those years. (R. 101.)

The Tax Court concluded (R. 101) that the option was given to taxpayer by Fleet as an inducement to secure his services for Consolidated. The termination clause was inserted because a termination of employment would terminate taxpayer's usefulness to Consolidated and to Fleet. The difference between the amount paid for the stock and its fair market value at the several dates of purchase was in the nature of compensation for services rendered or to be rendered by taxpayer.

SUMMARY OF ARGUMENT

A bargain purchase of corporate stock, the opportunity to make which is compensatory in character, results in income to the person to whom the privilege is afforded. It is not necessary, under the statute, that there shall be a technical employer-employee relationship between the grantor and the grantee; it is enough if the fact-finder finds that the grant was intended as remuneration for services. And that was the finding below in the case now at bar.

There is no merit to the taxpayer's alternative plea that if *arguendo* he received income here, he did so in the year the option was granted, and not in the years it was exercised as the Tax Court found. The

option was so conditioned that it could have had no value in itself as of the time of the grant.

ARGUMENT

The taxpayer realized income from his bargain purchases of the corporation's stock at the several purchase dates

a. It is immaterial that there was no employer-employee relationship between taxpayer and the grantor of the option to buy

Section 22 (a) of the Internal Revenue Code, *supra*, is broad enough to include in taxable income any economic or financial benefits conferred as compensation, whatever the form or mode by which it is effected. *Commissioner v. Smith*, 324 U. S. 177; *Old Colony Tr. Co. v. Commissioner*, 279 U. S. 716. And the concomitant Regulations, *supra*, specifically include in income property "transferred * * * by an employer to an employee, for an amount substantially less than its fair market value, * * *" even though the transfer takes the form of a sale or exchange, to the extent that the employee receives compensation. Thus a compensatory bargain purchase of corporate stock results in income to the person to whom the opportunity to make the purchase is afforded. See *Ward v. Commissioner*, 159 F. 2d 502 (C. C. A. 2d); *Hackett v. Commissioner*, 159 F. 2d 121 (C. C. A. 1st); *Frazer v. Commissioner*, 157 F. 2d 282 (C. C. A. 6th); *Oberwinder v. Commissioner*, 147 F. 2d 255 (C. C. A. 8th).

These general principles are conceded by the taxpayer at bar, but he claims (Br. 9 *et seq.*) that his particular situation is not encompassed by them. Specifically, he denies that the opportunity given him to

purchase the shares in question was compensatory in character—and this for the reason that the stock was the property of Fleet, the corporation's president, between whom and the taxpayer there existed no contract of employment. It is asserted (Br. 9) that taxpayer was the employee of the corporation which issued the shares, and not of the grantor of the option to purchase, whose personal holdings they were. The Government maintains, however, that the attempted distinction will not anywise serve to remove the taxpayer's case from the purview of the statute. It is, in our view, a distinction in effect without difference.

It is true that in the ordinary compensatory bargain purchase case, there is a technical contract of employment between the parties. And, parenthetically, we think it would be possible to argue here that this option was in fact the grant of the employer corporation, with Fleet merely the ostensible grantor. Cf. *Sweeney's Estate v. Commissioner*, 152 F. 2d 102 (C. C. A. 2d). Certainly there is nothing in the law of contracts to prevent a third party from furnishing the requisite *quid pro quo* for an agreement's validity. See Restatement of the Law of Contracts, Section 75. But if it be thought that such an argument is too speculative of basis under the findings in this case, our answer is that there is really no necessity to indulge it. For Section 22 (a) does not speak of employment by contract, either formal or informal; it does not speak of contract at all. It states, as expansively as words make possible, that gross income shall include *inter alia* "compensation for personal service * * * of whatever kind and in whatever form

paid, * * *.” It would seem, accordingly, that the taxpayer’s argument reads into the statute a requirement not there; it is no *sine qua non* of inclusion that the compensatory bargain purchase shall be incident to an employer-employee relationship between the grantor and the grantee. All that is necessary, we submit, is that the opportunity shall have been intended as remuneration for personal services performed or to be performed by the grantee. *Bogardus v. Commissioner*, 302 U. S. 34.

In that light, this case is no different in principle from the *Smith* case, *supra*.³ For assuredly, Fleet here intended, in giving this opportunity to purchase a part of his stock, to reward the taxpayer, so to speak, for the latter’s continued efforts in his position as the corporation’s factory manager. Fleet said so himself. Thus, his testimony ran (R. 103):

Q. Do you recall the salary that was to be paid [to taxpayer by the corporation]?

A. * * * I think it was \$10,000.00 a year and he to take down 50 shares of my stock a month for \$5.00 a share for the next ten years, or for ten years immediately following, conditioned upon his remaining in the employ of Consolidated Aircraft Corporation. * * *

* * * * *

Q. You also felt, did you not, Mr. Fleet, that the option which you gave Mr. Van Dusen would be regarded as something of an additional inducement to enter the employ of Consolidated?

³ A point of difference, not now relevant, will be considered hereinafter.

A. I think so.

* * * *

Q. But the motivating influence on your part of giving this privilege was to have Mr. Van Dusen work for Consolidated, wasn't it?

A. That's right.

Although such was manifestly not the case here as we shall presently see, we do not believe that, on strict legal theory, it would be necessary that Fleet should himself have been benefited, even indirectly, by taxpayer's continuing in the company service—the contemplated result of the grant to him of this opportunity to make bargain purchases of its stock. The benefit could go directly and exclusively to the corporation, with Fleet merely a third-party provider of the consideration, so long only as the grant of the privilege was not in fact the bestowal of a gift. Re-statement of the Law of Contracts, *supra*. There was certainly no proof whatever of intended gift here. And the court below specifically determined (R. 101) that the option was granted to taxpayer as an inducement to secure his services for the corporation—a finding in itself negating the idea of donative motivation on the part of the grantor, even without the further express declaration by the Tax Court in its opinion (R. 105) that “the benefit was not a gift by Fleet.”

In our view these Tax Court determinations serve fully to distinguish the instant case from that of *Bogardus v. Commissioner*, 302 U. S. 34, upon which the taxpayer is here placing reliance. (Br. 10.) In *Bogardus*, the Supreme Court held that a payment

of money by a holding company to a former employee of an operating company was a gift rather than additional compensation. The parties had there stipulated, however, that the payment was not made for any services, past or future; on this and other facts the Court concluded that the payment was intended as a gift—that it was in fact an act of “spontaneous generosity” (p. 42). The *Bogardus* case might be termed the landmark decision on the principle that intention is the controlling factor in determining whether or not an item is compensatory in character; but it does *not* stand for the proposition that compensation can only emanate from one who is an employer. Quite to the contrary—for in the *Bogardus* situation as in this, the payment came from one who was technically a “stranger” to the contract of employment. Yet the Court indicated there that the result might well be otherwise where the evidence does not clearly show, as it *did* in *Bogardus*, that the payor’s sole incentive was “the satisfaction which flows from the performance of a generous act” (p. 41). And as we have previously noted, far from concluding here that the grantor of this option was motivated by sheer altruism, the Tax Court took occasion specifically to point out (R. 104) that as president of Consolidated and a large holder of its stock, Fleet was personally and financially interested in the success and growth of the company, and therefore in securing the continued efforts of taxpayer toward those ends. The privilege was, moreover, expressly conditioned: It was to endure only so long as taxpayer remained in the company employ and

rendered his services to it. (R. 104.) In other words, Fleet was not parting with his stock to the taxpayer at such favorable prices unless he obtained from him "value received."

All of these matters, as well as the language used in the letter of grant (R. 97-98), point away from the notion of gift and lend more ample support, we think, to the Tax Court's conclusion that the opportunity which Fleet afforded the taxpayer to make these bargain purchases was intended to be compensation. Cf. *Poorman v. Commissioner*, 131 F. 2d 946 (C. C. A. 9th). And since intention is ultimately a factual question, on such substantiation the Tax Court's decision should certainly stand. *Commissioner v. Smith*, *supra*; *Dobson v. Commissioner*, 320 U. S. 489, rehearing denied, 321 U. S. 231.⁴

Furthermore, there is additional "evidence" that the *Bogardus* decision is not authority anywise *contra* to our position here, and that that position is sound. We refer now to the history of *Batterman v. Commissioner*, decided by the Tax Court February 5, 1943, on facts closely paralleling those which presently confront us. See 1943 P-H T. C. Memorandum Deci-

⁴ We are of course aware (cf. Br. 10) that in the *Bogardus* case, the Court stated (pp. 38-39) that the question of whether an item is compensatory in character is a "mixed" one of law and fact, and therefore subject to review. We suggest, however, that in respect of that statement *Bogardus* is now "outmoded" by the *Dobson* decision and the numerous Supreme Court cases in accord. E. g., *Commissioner v. Tower*, 327 U. S. 280; *John Kelley Co. v. Commissioner*, 326 U. S. 521; *Commissioner v. Court Holding Co.*, 324 U. S. 331; *Commissioner v. Scottish American Co.*, 323 U. S. 119. The *Smith* case itself is evidence, we think, that *Bogardus* is obsolete on this point.

sions, par. 43,098. In that case as in this, the item the character of which was in issue emanated from one who was not the recipient taxpayer's employer; in that case as in this, the grantor was "selfishly" motivated. And there, just as here, the Tax Court held the transfer to constitute the payment of compensation—despite the same plea which the instant taxpayer makes: That there can be no "compensation" in the absence of an employer-employee relationship between grantor and grantee. The Tax Court's *Batterman* opinion stated:

We know of nothing to prevent another than the employer from paying compensation for the employee's services, where, as here, he has a real interest in the services to be performed. Whether a limited and temporary employer-employee relationship sprang up between Dr. Dohme [the grantor] and the petitioner, or whether the transaction was, in effect, a contribution by the former to the capital of the corporation to enable it to pay the additional compensation to petitioner, need not be decided.

And of the *Bogardus* decision, upon which the *Batterman* taxpayer relied as supporting his position, the Tax Court said:

* * * [That] case turned on the Court's conviction that the payment was intended as a gift.

The *Batterman* case was taken to the Circuit Court of Appeals for the Sixth Circuit, and there it was *per curiam* affirmed, 142 F. 2d 448. But more importantly for the purpose of the point we now are making, the

Supreme Court denied certiorari (322 U. S. 756), although the chief basis of the taxpayer's petition to that Court was the *Bogardus* case. Incidentally, this denial of certiorari post-dated the *Dobson* decision—a strengthening point at least by inference, we submit, in support of our suggestion (footnote 4) that insofar as the *Bogardus* case held the matter of intention in these situations to be a reviewable one as a “mixed” question of law and fact, the decision is no longer good law.

Another case involving a nonemployer payor is *Schumacher v. United States*, 55 F. 2d 1007 (C. Cls.). There a bonus paid to the president of a railroad company by the holding corporation which owned the railroad's stock was held to be compensation. The court there said in rejection of the claimant's theory of gift (p. 1011):

It is immaterial that the payment received by the plaintiff was made by the holding company rather than by the company for which he had rendered service. The entire capital stock of the railroad company was owned by the holding company. The economic interests of the two companies were identical. The purchase price received from the sale of the railroad company went to the holding company. That the money received by the plaintiff was not paid directly by the railroad company but * * * by * * * the holding company does not change the essential character of the transaction, and make a gift out of what was intended to be, and in fact was, additional compensation for services rendered.

A situation similar to the *Schumacher* case was presented in *Bass v. Hawley*, 62 F. 2d 721 (C. C. A. 5th), and the same result was there reached. In that case too it was urged that not the payor, but another, was the employer of the taxpayer recipient. To that argument, however, the court simply answered (p. 724) that where intent is the question, the substance of the matter must be looked to rather than the form, and that the want of a technical employment relationship between payor and payee did not require a finding that the payment was a gift.

b. The compensation was received as of the times when the option was exercised, and not as of the time it was granted

Taxpayer argues in the alternative (Br. 12 *et seq.*), that assuming *arguendo* the receipt of compensation here, it was received as of the time the option was granted and not, as the Tax Court found (R. 101), at the several purchase dates. We think it plain that this argument has no more merit than does the taxpayer's principal one.⁵

Taxpayer's thesis runs thus: In *Commissioner v. Smith, supra*, the Tax Court has found that at the date of the option the market value of the stock did not exceed the option price; in this case, however, the court below has determined (R. 99) that on December 7, 1934, the date of the oral option (R. 97), there was a differential of between $37/8$ and $4\frac{1}{2}$ between option and market price. That differential, it is urged, gave to the option itself a present value at the date of the

⁵ This alternative theory was apparently not advanced in the Tax Court. Indeed it would appear to be inconsistent with the allegations in paragraph 5 (f) of the taxpayer's petition. (R. 7.)

grant and therefore marked the time when the compensation was received. But in our opinion the conclusion by no means follows from the premise; in addition, there are several obstacles to the taxpayer's making any argument at all here that the option itself was the "compensation" received. In the first place, not only is there no finding by the Tax Court that the option had a present value on the date it was given, but also there is not even a finding that the option as such was *intended* to be compensatory of the services which taxpayer was to render. Moreover, there is a total failure on the part of the taxpayer to produce evidence which would warrant such findings. Certainly, as we intend fully to demonstrate hereinafter, he does not do so merely by showing a price differential on the date of the option.

The findings actually made by the Tax Court, and which we have shown are adequately supported by the record, are even more explicit than the findings in *Commissioner v. Smith, supra*, upon which the Supreme Court affirmed the Tax Court's decision in that case. Here the Tax Court has expressly found (R. 101) that—

the difference between the amount paid for the stock and its fair market value at the several dates of purchase was in the nature of compensation for services rendered or to be rendered.

In the presence of this statement, and in the absence of any finding that the option had a market value when given, there seems to us no room for argument

that the option could itself operate to compensate the taxpayer.

Moreover, we submit, the record affirmatively compels the conclusion that the option had no market value when given. As we have stated, the taxpayer appears to believe (Br. 12) that he has proved to the contrary by showing that on the day the oral option was granted, Consolidated stock sold for an amount in excess of the option price. We do not believe, however, that in the circumstances of this case, that fact provides anything of the kind. The Supreme Court said in *Commissioner v. Smith, supra* (p. 181), that when the option price is less than the market price of the property for the purchase of which the option is given, it may have present value and may be found to be itself compensation for services rendered. But the Court went on there to say (p. 181) that the option could only so operate as it might be the means of securing the transfer of the shares of stock from the employer to the employee at a price less than their market value,—

or possibly, which we do not decide, as the option might be sold when that disparity in value existed.

Manifestly, neither one of these conditions is fulfilled here. Preliminarily, it may be noted that, while the oral option was given on December 7, the option could be exercised only while the taxpayer was in the company's employ, and such employment did not begin until December 10, 1934. (R. 96, 97-98.) Hence the fact of a differential between option and market price

on December 7 would seem somewhat academic; and the record fails to show what the market price of Consolidated stock was on December 10, 1934, which was the earliest date on which any shares might have been acquired under the option.

Moreover, this grant could not, under its terms, operate to secure the transfer to the taxpayer of any more than fifty shares of the stock in December of 1934, when the option was given, or in any one month thereafter. (R. 97-98.) So there would certainly be no basis whatever for setting as the minuend figure for the worth of this option in respect of the 2,350 shares which were actually acquired under it between 1938 and 1941 (R. 100), the value of that number of shares on the option date. The stock rose appreciably in value after that time; for example, when taxpayer made his 1938 purchases, it was worth close to \$11 per share as against the December 7, 1934, high of 9½. (R. 99, 100.) At the 1941 purchase date, its value was \$30 per share. (R. 100.) And this is to assume now, referring again to the terms of the grant (R. 97-98), that the taxpayer would have been able to command the transfer of *any* shares under the option; he could not have done so, of course, unless he had remained in the company employ, and that was a matter which could not be known at the date which taxpayer is now urging as being the critical one.⁶

⁶ It is to be noticed, too, that the option was to endure for ten years from its date, unless Fleet, the grantor, were to die or himself to quit the company employ—in which event the time was shortened to five years from date. (R. 98.) Had this contingency happened, there could have been no purchases made after December of 1939.

This brings us, we think, to the second of the Supreme Court's points in the *Smith* case with respect to the situations in which an option may itself operate as compensation, i. e. (p. 181)—“as the option might be sold when that disparity in value [the disparity between market value and option price] existed.” And we ask ourselves accordingly: Could this option have been sold on the option date for the difference between the then market value of the shares and the option price? Could it have been sold, indeed, at *any* price other than purely nominal? The answer, we think, is decidedly in the negative.

It was decided in *Ward v. Commissioner*, 159 F. 2d 502 (C. C. A. 2d), that for income tax purposes, the value to an employee of what is received as compensation for services is in final analysis its “disposal” value. So here: To what purchaser could the taxpayer have “disposed” of an option which was expressly conditioned on so uncertain a factor as his continuance in the employ of the issuing corporation. Obviously, he might have quit or been discharged for any number of reasons—or for no reason at all—and the buyer would have been quite helpless.⁷ The factual situation here is indeed somewhat similar to that which existed in the *Smith* case itself. There the taxpayer's acquisition of the stock which was the subject matter of the option was dependent

⁷ Unless of course as part of the sale of the option rights, the taxpayer had promised the purchaser to remain. But even that would not have protected against the taxpayer's discharge, or the possibility that the company itself might go out of business.

upon his grantor's own acquisition of the stock, which in turn was dependent upon the grantor's performance of a certain contract with the issuing corporation. *Commissioner v. Smith*, 324 U. S. 177, 178-179. The contingency in the *Smith* case was perhaps of a greater degree of complexity than the one in our case, but the effect, we think, is precisely the same. The condition renders the option incapable of anything except "hindsight" evaluation.

Furthermore, as we have previously indicated, the privilege of this taxpayer to buy was limited to fifty shares per month over a ten-year period; it is therefore quite obvious that any prospective purchaser of this option would be buying the chance that the value of the stock might fall during the potential purchase period, even below the option price. The effect of this hazard alone upon the amount anyone would be willing to pay for the option would be such, in our judgment, as to make its "disposal" value negligible on the date it was granted.

We think that the rule of the *Smith* case clearly governs the disposition of this one, and that the Tax Court was eminently correct in holding (R. 101) that the compensation received by taxpayer was the difference between the amount paid for the stock and its fair market value at the several dates of purchase.

CONCLUSION

The judgment of the Tax Court should be affirmed.

Respectfully submitted.

THERON LAMAR CAUDLE,
Assistant Attorney General.

GEORGE A. STINSON,

LEE A. JACKSON,

MARYHELEN WIGLE,

Special Assistants to the Attorney General.

DECEMBER 1947.



United States
Circuit Court of Appeals
For the Ninth Circuit

M. A. WYMAN; M. A. WYMAN, doing business
as M. A. WYMAN LUMBER COMPANY;
and M. A. WYMAN, M. H. WYMAN and
EDWARD DORAN, doing business as the
WYMAN MILL COMPANY,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division



No. 11701

United States
Circuit Court of Appeals
For the Fifth Circuit

M. A. WYMAN; M. A. WYMAN, doing business
as M. A. WYMAN LUMBER COMPANY;
and M. A. WYMAN, M. H. WYMAN and
EDWARD DORAN, doing business as the
WYMAN MILL COMPANY.

Appellants.

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division



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Seattle, Washington,

Attorneys for Appellee.

In the District Court of the United States for the
Western District of Washington, Northern
Division

Civil Action No. 1279

CHESTER BOWLES, Administrator, Office of
Price Administration,

Plaintiff,

vs.

M. A. WYMAN, d.b.a. M. A. Wyman Lumber
Company, M. A. WYMAN, M. H. WYMAN
and EDWARD DORAN, d.b.a The Wyman
Mill Company, and M. A. WYMAN, M. H.
WYMAN and EDWARD DORAN and THE
GRANITE FALLS PLANING MILL, a cor-
poration,

Defendants.

COMPLAINT FOR INJUNCTION AND TREBLE DAMAGES

Comes now plaintiff, above named, and for his
causes of action against defendants, above named,
alleges:

Count I.

1. That the Office of Price Administration is an
agency of the Government of the United States of
America, created by the provisions of Section 201(a)
of the Emergency Price Control Act of 1942 (50
U.S.C.A. 901 and 921), as amended (56 Stat. 765)
(57 Stat. 566), hereinafter referred to as the "Price

Control Act," and that Chester Bowles, plaintiff herein, is the duly appointed, qualified and acting Administrator thereof.

2. That jurisdiction of this cause of action is conferred upon the above entitled court by the provisions of Section 205(c) of the Emergency Price Control Act, as amended.

3. That the defendant M. A. Wyman, doing business as M. A. Wyman Lumber Company, now is, and has been at all times hereinafter mentioned a lumber dealer with his principal place of business in King County within the jurisdiction of this court.

4. That the defendants M. A. Wyman, M. H. Wyman and Edward Doran, a co-partnership, doing business as the Wyman Mill Company of Granite Falls, Washington, now are, and were at all times hereinafter mentioned, manufacturers of west coast lumber with their principal place of business in Snohomish County [2*] within the jurisdiction of this court.

5. That the defendant, The Granite Falls Planing Mill, Incorporated, a corporation, duly organized and existing under the laws of the State of Washington, is now, and was at all times hereinafter mentioned, operating a planing mill, processing or surfacing lumber with its principal plant in Snohomish County within the jurisdiction of this Court. That plaintiff is informed and believes and therefore alleges, that the defendants M. A. Wyman, M. H. Wyman and Edward Doran are the principal stockholders and officers of the defendant corporation.

* Page numbering appearing at foot of page of Reporter's certified Transcript of Record.

6. That in the judgment of the said Administrator, the defendants have engaged in acts and practices which constitute a violation of Section 4(a)(2), Section 4(b)(1)(2) and Section 4(c) of Revised Maximum Price Regulation 539, as amended (10 Federal Register 3224), hereinafter referred to as the "Regulation," which was issued pursuant to Section 2(a), Section 202(b) and Section 201(d) of said Price Control Act; and that therefore, pursuant to Section 205(a) of said Price Control Act, the Administrator makes this application for an injunction to enforce compliance with the aforementioned regulation.

7. That at all times and including July 5, 1944, said amended regulation has been, and now is in full force and effect, requiring in Section 4(a)(2), Section 4(b)(1)(2) and Section 4(c) that custom milling service charges may not be made unless authorization is obtained in the manner set forth in said regulation.

8. That at all times since and including the effective date of said regulation, said defendants have been, and now are sellers subject to said regulation, and that said defendants have failed to obtain authorization in conformation with Section 4(a)(2), Section 4(b)(1)(2) and Section 4(c), as provided, thereby violating said regulation.

9. That the defendants have sold in the course of trade or business commodities to-wit, western softwood lumber as defined in Revised Maximum Price Regulation 539, as amended (10 Federal Register 3224), at prices in [3] excess of the maximum price fixed by the regulation.

Count II.

1. Plaintiff incorporates herein and makes a part hereof, as fully as if set forth herein, Paragraphs 1, 2, 3, 4 and 5 of Count I of this complaint.

2. That in the judgment of the said Administrator, defendants have engaged in acts and practices which constitute a violation of Section 7(d)(1)(2) of Revised Maximum Price Regulation 26, as amended (9 Federal Register 1016, 3513, 4227, 7505, 9720, 11,112, 12,537; 10 Federal Register 4661, 5099, 5323).

3. That at all times since and including June 9, 1943, said amended regulation has been, and now is in full force and effect requiring in Section 7(d)(1)(2) that delivery charges preceding railroad shipments may be made only after special written permission is granted by the lumber branch of the Office of Price Administration, Washington, D. C., given after an application is made which recites facts showing the applicant is entitled to make the charge.

4. That at all times since and including the effective date of said regulation, said defendants *have and* now are sellers subject to said regulation, and that said defendants have sold distribution services to-wit, trucking charges in connection with western softwood lumber shipped by them in the course of trade or business in violation of Section 7(d)(1)(2) of Revised Maximum Price Regulation 26, as amended.

Count III.

1. Plaintiff incorporates herein and makes a part hereof, as fully as if set forth herein, Paragraphs 1, 2, 3, 4 and 5 of Count I of this complaint.

2. That in the judgment of said Administrator, the defendants have engaged in acts and practices which constitute a violation of Section 4(a)(2), Section 4(b)(1)(2) and Section 4(c) of Revised Maximum Price Regulation 539, as amended (10 Federal Register 3224), hereinafter referred to as the "Regulation," which was issued pursuant to Section 2(a), Section 202(b) and [4] Section 201 (d) of said Price Control Act; and that therefore, pursuant to Section 205(e) of said Price Control Act, the Administrator brings this suit for treble damages.

3. That at all times since and including July 5, 1944, said amended regulation has been, and now is in full force and effect, requiring in Section 4 (a)(2), Section 4(b)(1)(2) and Section 4(c) that custom milling service charges may not be made unless authorization is obtained in the manner set forth in said regulation.

4. That at all times since and including the effective date of said regulation, said defendants have been, and now are sellers subject to said regulation, and that said defendants have failed to obtain authorization in conformation with Section 4(a)(2), Section 4(b)(1)(2) and Section 4(c), as provided, thereby violating said regulation.

5. That the defendants have sold in the course of trade or business commodities, to-wit, western

softwood lumber as defined in Revised Maximum Price Regulation 539, as amended, at prices in excess of the maximum price fixed by the regulation. Plaintiff is informed and believes and therefore alleges, that three times the aggregate amount by which the prices received by the defendants in these sales exceed the maximum price provided under the regulation is \$57,064.35.

Count IV.

1. Plaintiff incorporates herein and makes a part hereof, as fully as if set forth herein Paragraphs 1, 2, 3, 4 and 5 of Count I of this complaint.

2. That in the judgment of the said Administrator, the defendants have engaged in acts and practices which constitute a violation of Section 7 (d)(1)(2) of Revised Maximum Price Regulation 26, as amended, hereinafter referred to as the "Regulation," which was issued pursuant to Section 2(a), Section 202(b) and Section 301(d) of said Price Control Act; and that therefore, pursuant to Section 205(e) of said Price Control Act, the Administrator brings this suit for treble damages.

3. That at all times since and including June 9, 1943, said amended [5] regulation has been, and now is in full force and effect requiring in Section 7(d)(1)(2) that delivery charges preceding railroad shipments may be made only after special written permission is granted by the lumber branch

of the Office of Price Administration, Washington, D. C., given after an application is made which recites facts showing the applicant is entitled to make the charge.

4. That at all times since and including the effective date of said regulation, said defendants have been and now are sellers subject to said regulation, and that said defendants have sold distribution services, to-wit, trucking charges in connection with western softwood lumber shipped by them in the course of trade or business in violation of Section 7(d)(1)(2) of Revised Maximum Price Regulation 26, as amended. Plaintiff is informed and believes and therefore alleges, that three times the aggregate amount by which the prices received by the defendants exceed the maximum price provided under the regulation is \$5,283.48.

Wherefore, Plaintiff Prays:

1. A preliminary and final injunction against said defendants, their agents, employees, and any and all persons acting in concert or participation with said defendants:

A. Ordering and directing them forthwith to fix the price of all lumber sold and delivered by them in accordance with the applicable provisions of Revised Maximum Price Regulation 539, as amended (10 Federal Register 3224), and particularly with Section 4(a)(2), Section 4(b)(1)(2) and Section 4(c) of said regulation.

B. Ordering and directing them forthwith to fix the transportation charges on all lumber sold and delivered by them in accordance with the applicable provisions of Revised Maximum Price Regulation 26, as amended (9 Federal Register 1016, 3513, 4227, 5705, 9720, 11,112, 12,537; 10 Federal Register 4661, 5099, 5323) and particularly 7(d)(1)(2) of said regulation. [6]

C. Ordering and directing them to do every other act required to be done by said regulation, and to do every act required to be done by any other applicable regulation or order relating to prices, heretofore or hereafter issued pursuant to said Price Control Act, as amended or extended.

D. Enjoining and restraining them permanently from doing any other act prohibited by said regulations, and from doing any act prohibited by any other applicable regulation or order relating to prices, heretofore or hereafter issued pursuant to said Price Control Act, as amended or extended.

2. Judgment in favor of the plaintiff and against the defendants in the sum of \$62,347.83.

3. And for such other and further relief as the court may deem just and equitable in the premises.

/s/ DANIEL M. REAUGH,
District Enforcement
Attorney,

/s/ ANDREW H. HITCHCOCK,
Enforcement Attorney,
Attorneys for Plaintiff.

Seattle District Office,
Office of Price Administration,
4451 White-Henry-Stuart Building,
Seattle, Washington.

[Endorsed]: Filed July 11, 1945. [7]

District Court of the United States for the Western
District of Washington, Northern Division
Civil Action File No. 1279

CHESTER BOWLES, Administrator, Office of
Price Administration,
Plaintiff,

vs.

M. A. WYMAN, d.b.a. M. A. Wyman Lumber
Company, M. A. WYMAN, M. H. WYMAN
and EDWARD DORAN, d.b.a. The Wyman
Mill Company, and M. A. WYMAN, M. H.
WYMAN and EDWARD DORAN and THE
GRANITE FALLS PLANING MILL, a cor-
poration,

Defendants.

SUMMONS

To the above named Defendants:

You are hereby summoned and required to serve upon Andrew H. Hitchcock, plaintiff's attorney, whose address is 4451 White-Henry-Stuart Building, Seattle, Washington, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Date: July 11, 1945.

[Seal] MILLARD P. THOMAS,
Clerk of Court.

By /s/ MARIAN MILLER,
Deputy Clerk.

Return on Service of Writ

I hereby certify and return, that on the 11th day of July, 1945, I received the within summons, together with Complaint for Injunction and Treble Damages, and that thereafter I served the same on the therein named M. A. Wyman Lumber Company by handing to and leaving a true and correct copy thereof with M. A. Wyman, owner, and I also served the same on the therein named Wyman Mill Company by handing to and leaving a true and correct copy thereof with M. A. Wyman, partner, and I also served the same on the therein named

Granite Falls Planing Mill, a corporation, by handing to and leaving a true and correct copy thereof with M. A. Wyman as an officer in company, of the 13th day of July, 1945, at Seattle, Washington.

Marshal's fees: Service, \$6.00.

DONALD F. MILLER,
United States Marshal.

By PATRICK J. BRADLEY,
Deputy United States
Marshal. [9]

[Endorsed]: Filed July 19, 1945. [8]

[Title of District Court and Cause.]

MOTIONS TO QUASH THE SERVICE OF
SUMMONS AND COMPLAINT OF THE
GRANITE FALLS PLANING MILL, A
CORPORATION

(Rule 4d FRCP, USCA 28, Par. 723c)

Comes now the Granite Falls Planing Mill, a corporation, defendant above named, and appearing specially for the purpose of this motion and for no other purpose, respectfully moves the Court to quash the service of the summons and complaint in the above cause made on M. A. Wyman as an officer of said Granite Falls Planing Mill, a corporation, on July 13, 1945, on the ground that said M. A. Wyman was not an officer of said corpora-

tion, nor a managing or general agent thereof, or any other agent of said corporation authorized by appointment or by law to receive service of process on July 13, 1945, nor at any time during 1945.

This motion is based upon the records and files in the above entitled cause and the affidavit of M. A. Wyman hereto attached.

C. E. HUGHES,

Attorney for the Granite Falls Planing Mill, a corporation.

State of Washington,
County of King—ss.

M. A. Wyman, being first duly sworn, on oath deposes and says:

That he is the M. A. Wyman mentioned in the return of service made by Patrick J. Bradley, Deputy U. S. Marshal, dated July 11, 1945, and filed in the above entitled cause on July, 1945, in which said Deputy Marshal states [10] that he served a copy of the summons and complaint in the above cause on M. A. Wyman as an officer of Granite Falls Planing Mill, a corporation, on July 13, 1945.

Affiant states that he was not an officer, director or stockholder of said corporation on July 13, 1945, nor at any time during 1945, nor a managing or general agent thereof or any other agent of said corporation authorized by appointment or by law to receive service of process on July 13, 1945, nor at any time during 1945.

This affidavit is made for the purpose of quashing the service of the summons and complaint in the above cause on affiant as an officer of said corporation or any kind of an agent connected with said corporation.

M. A. WYMAN.

Subscribed and sworn to before me this 1st day of August, 1945.

[Seal] C. E. HUGHES,
Notary Public in and for the State of Washington,
residing at Seattle.

Copy received August 1, 1945.

ANDREW HITCHCOCK,
per D. B.,
Attorney for Plaintiff.

[Endorsed]: Filed Aug. 10, 1945. [11]

[Title of District Court and Cause.]

AMENDED COMPLAINT FOR INJUNCTION
AND TREBLE DAMAGES

Comes now plaintiff, above named, and for his causes of action against defendants, above named, alleges:

Count I.

1. That the Office of Price Administration is an agency of the Government of the United States of America, created by the provisions of Section 201 (a) of the Emergency Price Control Act of 1942 (50 U.S.C.A. 901), as amended (56 Stat. 765; 57 Stat. 566, P. L. 108, 79th Congress, First Session),

hereinafter referred to as the "Price Control Act," and that Chester Bowles, plaintiff herein, is the duly appointed, qualified and acting Administrator thereof.

2. That jurisdiction of this cause of action is conferred upon the above entitled court by the provisions of Section 205(c) of the Price Control Act, as amended.

3. That the defendant, M. A. Wyman, doing business as M. A. Wyman Lumber Company was, at all times hereinafter mentioned, engaged in the business of buying and selling lumber with his principal place of business in King County within the jurisdiction of this court. [12]

4. That, the defendants M. A. Wyman, M. H. Wyman and Edward Doran, a co-partnership, doing business as Wyman Mill Company, were, at all times, hereinafter mentioned, engaged in the business of producing West Coast rough softwood lumber with their principal place of business in Snohomish County within the jurisdiction of this court.

5. That, the defendant, the Granite Falls Planing Mill, Inc., a corporation, duly organized and existing under the laws of the State of Washington, was, at all times, hereinafter mentioned, engaged in the business of milling western softwood lumber with its principal place of business in Snohomish County within the jurisdiction of this court. That, the principal officers and stockholders of said corporation from July 11, 1944, to and including December 22, 1944, were M. A. Wyman, M. H. Wyman, and Edward Doran.

6.(A) That, in the judgment of the said Administrator, the defendants, from July 11, 1944, to and including December 22, 1944, were engaged in the acts and practices hereinafter described which constituted a violation of Maximum Price Regulation 539, Custom Milling and Kiln Drying of Western softwoods (9 Fed. Reg. 6152), hereinafter referred to as "MPR 539" which was issued pursuant to Section 2(a), Section 202(b) and Section 201(d) of said Price Control Act; and that, therefore, pursuant to Section 205(a) of said Price Control Act, the Administrator makes this application for an injunction to enforce compliance with said MPR 539.

(B) That, at all times, since June 5, 1944, MPR 539 has been in effect establishing maximum prices for custom milling and kiln drying services as defined therein on specified Western softwood lumber.

(C) In particular, MPR 539 provides that custom mill under common ownership or control with saw mills producing Western softwood lumber cannot qualify as custom mills under MPR 539 unless and until they obtain special authorization from the Office of Price Administration at its Regional Office nearest the operation. Unless such authorization is obtained, the maximum prices which [13] the seller may charge the purchaser, for both the lumber and for milling or kiln drying are the ceiling prices fixed in the appropriate mill regulation for the end product reaching the purchaser after milling or kiln drying.

(D) That, the defendants, from July 11, 1944, to and including December 22, 1944, owned and controlled a saw mill producing lumber of a species of Western softwood lumber covered by RMPR 26, and also owned and controlled a custom mill selling and providing custom mill services on the lumber produced by the saw mill to purchasers for use in the course of trade or or business. That, the defendants did not secure authorization from the Office of Price Administration at its Regional Office in San Francisco to charge custom milling prices as set forth in MPR 539 for such services, and that the total prices charged for said services and lumber were in excess of the maximum prices established by RMPR 26 for the lumber as delivered to the purchaser.

6. That, said overcharges heretofore mentioned in Paragraph 6 hereof are fully set forth in Exhibit "A" which is affixed hereto and made a part hereof as fully as if set forth herein.

Count II.

1. Plaintiff incorporates herein and makes a part hereof, as fully as if set forth herein, Paragraphs 1, 2, 3, 4 and 5 of Count I of this complaint.

2.(A) That, the defendants from July 11, 1944, to and including December 22, 1944, were engaged in the acts and practices hereinafter described which constituted a violation of Maximum Price Regulation 539, Custom Milling and Kiln Drying of Western softwoods (9 Fed. Reg. 6152), hereinafter referred to as "MPR 539" which was issued pur-

suant to Section 2(a), Section 202(b) and Section 201(d) of said Price Control Act; and that therefore pursuant to Section 205(e) of said Price Control Act, the [14] Administrator brings this action for treble damages.

(B) That, at all times, since June 5, 1944, MPR 539 has been in effect establishing maximum prices for custom milling and kiln drying services as defined therein on specified Western softwood lumber.

(C) In particular, MPR 539 provides that custom mills under common ownership or control with saw mills producing Western softwood lumber cannot qualify as custom mills under MPR 539 unless and until they obtain special authorization from the Office of Price Administration at its Regional Office nearest the operation. In any such cases, the maximum prices which the seller may charge the purchaser for both the lumber and for milling or kiln drying are the ceiling prices fixed in the appropriate mill regulation for *the and* product reaching the purchaser after milling or kiln drying.

3. That, said overcharges heretofore mentioned in Paragraph 2 heretofore are fully set forth in -Exhibit "A" which is affixed hereto and made a part hereof by reference as fully as if set forth herein. That, the amount by which the prices charged by the defendants exceeds the maximum prices provided under said regulation is \$19,130.89.

Wherefore, Plaintiff prays:

1. A preliminary and final injunction against

said defendants, their agents, employees, and any and all persons acting in concert or participation with said defendants:

- A. Ordering and directing them forthwith to fix the price of all custom milling services sold or provided by them in accordance with the applicable provisions of Maximum Price Regulation 539 (9 Fed. Reg. 6152).
- B. Ordering and directing them to do every other act required to be done by said regulation, and to do every act required to be done by any other applicable regulation or order relating [15] to prices, heretofore or hereafter issued pursuant to said Price Control Act as amended or extended.
- C. Enjoining and restraining them permanently from doing any other act prohibited by said regulations, and from doing any act prohibited by any other applicable regulation or order relating to prices, heretofore or hereafter issued pursuant to said Price Control Act, so amended or extended.

2. Judgment in favor of the plaintiff and against the defendants for three times the overcharges which sum is \$57,392.67.

3. And for such other and further relief as the court may deem just and equitable in the premises.

/s/ ANDREW H. HITCHCOCK,

Enforcement Attorney.

s/ DANIEL M. REAUGH,

Attorneys for Plaintiff.

EXHIBIT A

Sales by Defendants from July 11, 1944 to December 22, 1944

Purchasers	Date	Amount Collected	Ceiling Price	Amount Over- charges
George W. Ulteh Lumber Co.....	7-29-44	\$243.97	\$50.58	\$193.39
The A. C. Houston Lbr. Co.....	7-10-44	198.91	40.64	158.27
J. B. Houston & Son.....	7-12-44	206.73	41.25	165.48
Houston Lumber Co.....	7-17-44	234.09	49.65	184.44
Houston Bros., Inc.....	7-11-44	245.78	43.94	201.84
Houston Lumber Co.....	7-17-44	237.93	49.84	188.09
Houston Lumber Co.....	7-14-44	233.09	47.17	185.92
J. B. Houston & Son.....	7-17-44	221.12	44.79	176.33
J. Lentin Lumber Co.....	7-19-44	237.11		237.11
Klein Lumber Co.....	7-18-44	147.22	10.47	136.75
Houston Lumber Co.....	7-19-44	251.16	50.16	201.00
J. B. Houston & Son.....	7-20-44	226.92	46.62	180.30
J. B. Houston & Son.....	7-25-44	223.45	44.85	178.60
Coerper Bros. Lumber Co.....	7-22-44	236.28	11.75	224.53
McCoy Lumber Co.....	7-27-44	222.50	27.19	195.31
McCoy Lumber Co.....	7-25-44	255.72	35.12	220.60
Hazen Lumber Co.....	7-25-44	150.01	7.90	142.11
Houston Lumber Co.....	7-31-44	256.11	54.20	201.91
J. B. Houston & Son.....	8- 1-44	195.02	30.39	164.63
Houston Lumber Co.....	8- 2-44	222.69	41.17	181.52
Houston Lumber Co.....	8- 5-44	242.05	49.48	192.57
Houston Lumber Co.....	8- 5-44	226.16	47.85	178.31
Houston Bros., Inc.....	8- 7-44	259.70	38.70	221.00
Houston Lumber Co.....	8-11-44	239.27	50.14	189.13
J. B. Houston & Son.....	8-11-44	240.60	48.42	192.18
George W. Ulteh Lumber Co.....	8-12-44	243.77	51.48	192.29
George W. Ulteh Lumber Co.....	8-14-44	232.43	46.48	185.95
J. Add Adams.....	8-24-44	193.67	39.16	154.51
Hosmer Lumber Co.....	8-16-44	227.22	35.52	191.70
St. Charles Lumber & Fuel Co.....	8-17-44	204.51	41.31	163.20
Bockelheide Lumber Co.....	8-24-44	197.80	40.45	157.35
Houston Bros., Inc.....	8-22-44	251.78	44.95	206.83
St. Charles Lbr. & Fuel Co.....	8-18-44	222.67	44.22	178.45
Huebsch Mfg. Co.....	9- 9-44	272.99	43.10	229.89
St. Croix River Co.....	8-31-44	198.03		198.03
Elliott Lumber Co.....	8-31-44	219.42	43.88	175.54

Purchasers	Date	Amount Collected	Ceiling Price	Amount Over- charges
James Shaw & Son Co., Inc.....	8-31-44	\$231.02	\$47.56	\$183.46
Erwerwe Lumber Co.....	9- 5-44	163.76	46.46	117.30
Elliot Lumber Co.....	9- 6-44	241.71	38.60	203.11
Elliot Lumber Co.....	9-12-44	228.48	10.60	217.88
Central Lumber Sales Co.....	9- 7-44	228.71	46.27	182.44
J. J. Hussey Lumber Co.....	9- 8-44	229.47	46.78	182.69
Frank W. Grubb & Sons Co.....	9-12-44	239.63	38.22	201.41
Erper Lumber Co.....	9-15-44	220.32		220.32
Central Lumber Sales Co.....	9-13-44	204.39	41.58	162.81
Home Lumber Co.....	9-15-44	202.13	33.47	168.66
Central Lumber Sales Co.....	9-15-44	190.06	38.40	151.66
Central Lumber Sales Co.....	9-20-44	213.27	32.93	180.34
Central Lumber Sales Co.....	9-21-44	186.38	39.65	146.73
Sachmayer Lumber Co.....	9-25-44	215.81	28.54	187.27
Central Lumber Sales Co.....	9-26-44	171.00	35.63	135.37
Central Lumber Sales Co.....	9-30-44	241.66	45.05	196.61
Landan Mercantile Co.....	10- 2-44	233.71	39.98	193.73
Central Lumber Sales Co.....	10- 6-44	151.86	26.01	125.85
Landan Mercantile Co.....	10-11-44	231.06	38.47	192.59
Central Lumber Sales.....	10-11-44	207.25	31.03	176.22
Central Lumber Sales Co.....	10-11-44	187.42	25.60	161.82
Central Lumber Sales Co.....	10-13-44	238.31	43.83	194.48
J. Lentin Lumber Co.....	10-13-44	240.30	43.30	197.00
Central Lumber Sales Co.....	10-12-44	236.76	37.30	199.46
Central Lumber Sales Co.....	10-17-44	226.11	33.27	192.84
Airmount Mill & Lumber Co.....	10-17-44	288.70	42.32	246.38
t. Croix River Co.....	10-16-44	199.13	49.78	149.35
J. Lentin Lumber Co.....	10-20-44	229.70		229.70
Central Lumber Sales Co.....	10-23-44	211.33	28.76	182.57
Central Lumber Sales Co.....	10-24-44	177.88	35.65	142.23
Central Lumber Sales Co.....	10-24-44	225.21	35.91	189.30
Central Lumber Sales Co.....	10-25-44	241.06	24.17	216.89
J. W. Frank & Co.....	10-26-44	226.58	46.52	180.06
Central Lumber Sales Co.....	10-27-44	224.08	41.52	182.56
J. W. Frank & Co.....	10-27-44	183.32	40.23	143.09
Central Lumber Sales Co.....	10-28-44	231.96	46.42	185.54
Central Lumber Sales Co.....	10-30-44	254.27	33.29	220.98
otlatch Yards, Inc.....	10-30-44	45.45	13.63	31.82
t. Croix River Co.....	11- 1-44	215.14	53.78	161.36

Purchasers	Date	Amount Collected	Ceiling Price	Amount Over- charges
Central Lumber Sales Co.....	11- 3-44	\$241.27	\$32.56	\$208.71
Gillman Lumber & Cabinet Co.....	11- 2-44	146.14		146.14
Central Lumber Sales Co.....	11- 6-44	215.64	40.45	175.19
St. Croix River Co.....	11- 6-44	215.54	53.88	161.66
Coerper Lumber Co.....	11- 7-44	222.88	47.76	175.12
St. Croix River Co.....	11- 7-44	174.66	43.67	130.99
Central Lumber Sales Co.....	11-11-44	213.21	32.26	180.95
Central Lumber Sales Co.....	11-10-44	161.20	21.78	139.42
Central Lumber Sales Co.....	11-10-44	198.23	29.47	168.78
St. Croix River Co.....	11-13-44	177.75	44.44	133.31
Central Lumber Sales Co.....	11-14-44	240.23	41.60	198.63
Coerper Lumber Co.....	11-18-44	180.00		180.00
St. Croix River Co.....	11-16-44	174.87	43.72	131.15
Central Lumber Sales Co.....	11-18-44	234.58	36.00	198.58
St. Croix River Co.....	11-22-44	160.76	40.19	120.57
Central Lumber Sales Co.....	11-21-44	222.99	44.40	178.59
Central Lumber Sales Co.....	11-24-44	176.77	33.79	142.98
R. W. Frank & Co.....	11-22-44	160.02	29.89	130.13
Mandan Mercantile Co.....	11-25-44	217.84	36.38	181.46
Spellman & Co.....	11-28-44	232.09	47.18	184.91
Central Lumber Sales Co.....	11-30-44	183.99	28.34	155.65
J. W. Patterson Co.....	11-30-44	221.70	39.70	182.00
R. W. Frank & Co.....	11-30-44	236.59	28.99	207.60
Coerper Lumber Co.....	12- 4-44	205.70	41.47	164.23
W. J. Campbell Lumber Co.....	12- 6-44	173.45		173.45
St. Croix River Co.....	12-15-44	228.98	36.03	192.75
St. Croix River Co.....	12-15-44	219.27	36.46	182.81
St. Croix River Co.....	12-16-44	238.30	37.27	201.03
Central Lumber Sales Co.....	12-19-44	200.19	17.90	182.29
St. Croix River Co.....	12-19-44	223.60	34.02	189.58
St. Croix River Co.....	12-21-44	233.23	32.38	200.85
Central Lumber Sales Co.....	12-22-44	193.50	21.04	172.46

Total.....\$19,130.67

[Endorsed]: Filed Nov. 7, 1945.

In the District Court of the United States in and
for the Western District of Washington,
Northern Division.

Civil Action File No. 1279

CHESTER BOWLES, Administrator,
Office of Price Administration,

Plaintiff.

vs.

M. A. WYMAN, d.b.a. M. A. Wyman Lumber
Company, et al.,

Defendants.

SUMMONS IN CIVIL ACTION

To the above named Defendant:

You are hereby summoned and required to serve upon Andrew H. Hitchcock, plaintiff's attorney, whose address 3319 White-Henry-Stuart Building, Seattle 2, Washington an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[Seal] MILLARD P. THOMAS,
Clerk of the Court.

By /s/ SIGFRIED HENDRICKSON,
Deputy Clerk

Date, Nov. 7, 1945.

RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the 7th day of November, 1945, I received the within summons together with a copy of amended complaint for Injunction and Treble damages and that thereafter I served the same on the therein named M. A. Wyman, d.b.a. M. A. Wyman Lumber Company by handing to and leaving a true and correct copy thereof with M. A. Wyman at Seattle, Washington on the 3rd day of December, 1945. And I also served the therein named M. A. Wyman, M. H. Wyman and Edward Doran, d.b.a. The Wyman Mill Company by handing to and leaving a true and correct copy thereof with M. A. Wyman, Owner in the Company on the 3rd day of December, 1945, at Seattle, Washington and I also served the therein named M. A. Wyman, M. H. Wyman and Edward Doran by handing to and leaving a true and correct copy with each of them personally: M. A. Wyman on the 3rd day of December, 1945, M. H. Wyman on the 9th day of November, 1945 both at Seattle, Washington and Edward Doran on the 20th day of November at Granite Falls, Washington; and I also served the therein named Granite Falls Planning Mill, a corporation by handing to and leaving a true and correct copy thereof with M. H. Wyman, on the 9th day of November, 1945 at Seattle.

J. S. DENISE.

United States Marshal.

By /s/ JAMES M. SCHWERDFIELD.

Marshal's Fees: Travel \$11.94; Service \$12.00;
Total \$23.94.

[Endorsed]: Filed Dec. 4, 1945.

[Title of District Court and Cause.]

MOTION TO QUASH THE SERVICE OF THE
SUMMONS AND AMENDED COMPLAINT
ON THE GRANITE FALLS PLANING
MILL, a corporation, and M. H. WYMAN.

Come now M. H. Wyman and the Granite Falls Planing Mill, a corporation, defendants above named, and appearing specially for the purpose of this motion and for no other purpose, respectfully move the Court to quash the service of the summons and amended complaint in the above cause made on M. H. Wyman individually and as an officer of said Granite Falls Planing Mill, a corporation, on November 9, 1945, on the ground and original summons and complaint was filed herein, and summons was issued thereon July 11, 1945, and that no service of summons or complaint in said cause was made on said M. H. Wyman or said Granite Falls Planing Mill, a corporation, within three months after the issuance of said summons, and said action abated as to said defendants on October 11, 1945, as provided by Rule 15, Rules of the United States District Court for the Western District of Washington and the laws of the State of Washington, and cannot be revived by an amended complaint.

This motion is based upon the records and files in the above cause and the affidavit of C. E. Hughes hereto attached.

/s/ C. E. HUGHES,

Attorney for M. H. Wyman
and Granite Falls Planing
Mill, a corporation.

State of Washington,
County of King—ss.

C. E. Hughes, being first duly sworn on oath disposes and says: That he is the attorney for M. H. Wyman and Granite Falls Planing Mill, a corporation, defendants above named. That on July 11, 1945, the original summons and complaint was filed in the above cause and summons was duly issued thereon July 11, 1945, that no service of a summons or complaint in this cause was made on either of said defendants within three months after the issuance of said summons as provided by Rule 15 of this Court and the laws of the State of Washington. That neither of said defendants have appeared generally herein, nor has the time to effect service on said defendants or either of them been extended by any order as provided in said Rule 15.

That on November 7, 1945, nearly four months after said issuance of the original summons, plaintiff caused to be filed in the above Court and cause, a new summons and an amended complaint, and a new summons was issued thereon on said date, and on November 9, 1945, two copies of said summons and amended complaint on file herein were served on M. H. Wyman at Seattle, Washington, individually as President of said corporation, which is the only service ever made on said defendants, or either of them. That said M. H. Wyman has lived and has been in Seattle continuously at all times

since long prior to July 11, 1945, but no attempt was ever made to serve said summons or complaint or amended complaint on him until November 9, 1945.

That in accordance with the provisions of said Rule 15 and the laws of the State of Washington, said action abated and terminated as to said defendants on October 11, 1945, at which time this Court lost jurisdiction over said defendants, and said action cannot be revived by an amended complaint.

C. E. HUGHES,

Subscribed and Sworn to before me this 28th day of November, 1945.

[Seal]

LUCILE LASNIER,

Notary public in and for the State of Washington, residing at Seattle. [24]

Copy recd. 11/28/45,

A. H. HITCHCOCK,

Attorney for Plaintiff.

Copy recd. 11/28/45

OGDEN & OGDEN,

Attorneys for Edward Doran.

[Endorsed]: Filed Nov. 29, 1945.

[Title of District Court and Cause.]

MOTION TO QUASH THE SERVICE OF
SUMMONS AND AMENDED COMPLAINT
SERVED UPON DEFENDANT EDWARD
DORAN

Comes now Edward Doran, one of the defendants above named, appearing specially and for the purpose of this motion and for no other purpose whatsoever, and respectfully moves the Court to quash the service of the summons and amended complaint in the above entitled cause made on Edward Doran on November 20, 1945, on the ground that the original summons and complaint was filed herein on July 11, 1945, and that no service of a summons and original complaint in this said cause was made on Edward Doran at any time whatsoever on or subsequent to July 11, 1945, and that on November 20, 1945, defendant Doran was served with a summons attached to an amended complaint; that no order of court or permission of Court was ever granted, permitting the plaintiff to serve defendant Doran with a summons or amended complaint, nor was there any extension of time ever granted to the plaintiff in which to perfect service of the original summons and the original complaint; that at all times from and after July 11, 1945, defendant Doran was working at either Darrington or Granite Falls, in Snohomish County, Washington, and no attempt by him was ever made to evade service of the summons and complaint in this said cause [26] of ac-

tion. Accordingly, it is submitted that said cause of action was abated as to defendant Doran after the expiration of ninety days from and after July 11, 1945, as provided for by Rule 15 of the Local Rules of the United States District Court for the Western District of Washington, Northern Division, Relating to Civil Actions, and in accordance with the laws of the State of Washington relating to service of summons within ninety days after the date of the filing of said summons.

This motion is based upon the records and files of the above entitled cause and on the affidavit of Raymond D. Ogden, Jr., one of the attorneys for the defendant Doran herein.

OGDEN & OGDEN,
By RAYMOND D. OGDEN, JR.,
Attorneys for Defendant
Edward Doran.

Received copy Dec. 7/45.

ANDREW H. HITCHCOCK.

Received copy Dec. 7/45.

C. E. HUGHES,
Attorney.

[Endorsed]: Filed Dec. 8, 1945. [27]

[Title of District Court and Cause.]

AFFIDAVIT OF RAYMOND D. OGDEN, JR.,
IN SUPPORT OF MOTION TO QUASH
SERVICE OF SUMMONS AND AMENDED
COMPLAINT ON DEFENDANT EDWARD
DORAN

United States of America,
State of Washington,
County of King—ss.

Raymond D. Ogden, Jr., being first duly sworn, on oath deposes and says:

That he is one of the attorneys for the defendant Edward Doran in the above action; that the records in the above entitled cause show that the original summons in "Civil Action File No. 1279" was filed July 11, 1945, in accordance with the date stamped on the face of said summons; That Edward Doran was never served with the original summons or the original complaint in said action at any time; that the only summons served upon Edward Doran in the above entitled cause was on the 20th day of November, 1945, when he was served with a summons bearing a date stamped on the face thereof of November 7, 1945, which summons was attached to an amended complaint; that the defendant Edward Doran has not appeared generally in this action, nor has the time to effect service on the defendant Doran been extended by an order of court as provided for in Rule 15 of [28] the Local

Rules of the United States District Court for the Western District of Washington, Northern Division, Relating to Civil Actions.

That at all times from and after July 11, 1945, said Edward Doran was a resident of the State of Washington and was at all times working either in Granite Falls, Washington, or Darrington, Washington.

/s/ RAYMOND D. OGDEN, Jr.

Subscribed and sworn to before me this 7th day of December, 1945.

[Seal] NOLA N. BARRON,
Notary Public in and for the State of Washington,
residing at Seattle.

Received copy Dec. 7/45.

ANDREW H. HITCHCOCK.

Received copy 12/7/45.

C. E. HUGHES,
Attorney.

[Endorsed]: Filed Dec. 8, 1945. [29]

[Title of District Court and Cause.]

MOTION TO DISMISS COUNTS I AND II
OF THE AMENDED COMPLAINT

Come now all the defendants above named, except Edward Doran, and without waiving the special appearance herein of M. H. Wyman and Granite Falls Planing Mill, and in the event of the denial of their motion to quash, each of said defendants separately moves against plaintiff's amended complaint as follows:

1. To dismiss Count I thereof on the ground that said count does not allege facts sufficient to warrant or justify the issuance of a mandatory injunction or any other injunction against said defendants, or any of them, nor state a claim upon which relief can be granted; and on the further ground that it affirmatively appears from said amended complaint, that none of said defendants are now, or have at any time since December 22, 1944, violated any regulation, or that said defendants or any of them are now or have at any time since December 22, 1944, threatened to do so, or that plaintiff has shown any need or justification for an injunction.

2. To dismiss Count II thereof, on the ground that said count does not allege facts sufficient to constitute a cause of action against said defendants or any of them, nor state a claim [30] upon which relief can be granted, and on the further ground

that said defendants are in no way connected with the violation of any regulation.

These motions are made separately by each of said defendants, and are based upon the records and files in the above cause.

C. E. HUGHES,
Attorney for all the Defendants except Edward
Doran.

1026 Henry Building,
Seattle, Washington.

Copy received 11/28/45.

A. H. HITCHCOCK,
Attorney for Plaintiff.

Copy received 11-28-45.

OGDEN & OGDEN,
Attorneys for Edward Doran.

[Endorsed]: Filed Nov. 29, 1945. [31]

[Title of District Court and Cause.]

MOTION TO DISMISS COUNT I AND
COUNT II OF AMENDED COMPLAINT

Comes now the defendant Edward Doran and without waiving his special appearance herein, and in the event of the Court's denial of defendant Doran's motion to quash said defendant moves against the amended complaint of the plaintiff as follows:

I.

To dismiss Count I thereof on the ground that said Count I does not state a cause of action against the defendant Doran, nor does it state facts sufficient to justify or warrant this Court in the issuance of a mandatory injunction, or any injunction at all, against the defendant Edward Doran; and on the further ground that it affirmatively appears in the allegations of Count I that no act or deed had been committed or performed by defendant Doran from and after December 22, 1944, effecting the subject matter alleged in said Count I, nor does any allegation appear in said Count I that the defendant Edward Doran has threatened to or intends to commit any act or deed concerning which a mandatory injunction or any injunction could be issued. [32]

II.

Defendant Doran moves to dismiss Count II thereof on the ground that said Count II does not

allege facts sufficient to constitute a cause of action against said defendant Doran, nor does it state facts sufficient to warrant the Court in granting any relief whatsoever to the plaintiff as respects the allegations of Count II; and on the further ground that there is no allegation in Count II which specifically alleges or points out the commission of any act or deed, or the omission of any act or deed, on the part of the defendant Doran, which would justify or warrant this Court in granting any relief whatsoever to the plaintiff as against the defendant Doran.

This motion is based upon the records and files in the above entitled cause.

OGDEN & OGDEN,
By RAYMOND D. OGDEN, JR.,
Attorneys for Defendant
Edward Doran.

Received copy Dec. 7/45.

ANDREW H. HITCHCOCK.

Received copy Dec. 7/45.

C. E. HUGHES,
Attorney.

[Endorsed]: Filed Dec. 8, 1945. [33]

[Title of District Court and Cause.]

ORDER ON MOTIONS OF GRANITE FALLS
PLANING MILL, A CORPORATION, M. H.
WYMAN AND EDWARD DORAN

This matter having come on duly and regularly to be heard on the motions of Granite Falls Planing Mill, a corporation, M. H. Wyman and Edward Doran, to quash the service of the summons and amended complaint in the above cause made on M. H. Wyman individually and as an officer of said corporation on November 9, 1945, and on Edward Doran November 20, 1945; on the grounds therein set forth; plaintiff appearing by his attorneys, Andrew H. Hitchcock and Frederick W. Post, defendants, Granite Falls Planing Mill, a corporation, and M. H. Wyman appearing specially by their attorney, C. E. Hughes, and Edward Doran appearing specially by his attorneys, Ogden and Ogden, and arguments having been heard for and against said motion, and this Court having considered said motions to quash as motions to dismiss;

It Is, Therefore, Ordered and Adjudged that Granite Falls Planing Mill, a corporation, defendant above named, be and it is hereby dismissed from said suit.

It is further Ordered and Adjudged that M. H. Wyman and Edward Doran, defendants above named, be and they are hereby dismissed [34] from said suit as individuals.

Done in Open Court this 15th day of February,
1946.

JOHN C. BOWEN,
District Judge.

Approved and presented by:

C. E. HUGHES,
Attorney for Granite Falls
Planing Mill, a corporation,
and M. H. Wyman.

Approved:

RAYMOND D. OGDEN, JR.,
Attorney for Edward Doran.

A. H. HITCHCOCK,
FREDERICK W. POST,
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 15, 1946. [35]

[Title of District Court and Cause.]

ORDER ON DEFENDANTS' MOTIONS
TO DISMISS

This matter having come on duly and regularly to be heard on motions of all the defendants above named to dismiss Counts I and II of plaintiff's amended complaint, plaintiff appearing by his attorneys, Andrew H. Hitchcock and Frederick W. Post, and Edward Doran appearing by his attorneys, Ogden and Ogden, and all the remaining defendants appearing by their attorney, C. E. Hughes,

and this Court having heard arguments for and against said motions made separately as to each of said Counts, and being duly advised in the premises;

It Is, Therefore, Ordered and Adjudged that said defendants' motions to dismiss Count I of plaintiff's amended complaint be and they are hereby denied.

It is further Ordered and Adjudged that said defendants' motion to dismiss Count II of plaintiff's amended complaint be and they are, hereby granted with leave to file a second amended complaint herein within two weeks.

Done in Open Court this 15th day of February, 1946.

JOHN C. BOWEN,
District Judge.

Approved and presented by:

/s/ C. E. HUGHES,

Attorney for Granite Falls
Planing Mill, a corporation,
and M. H. Wyman.

Approved as to form:

/s/ A. H. HITCHCOCK.

Approved by:

/s/ RAYMOND D. OGDEN, JR.,
Attorney for Edward Doran.

[Endorsed]: Filed Feb. 15, 1946. [36]

[Title of District Court and Cause.]

SECOND AMENDED COMPLAINT FOR AN
INJUNCTION AND TREBLE DAMAGES

Comes now plaintiff, above named, and for his causes of action against defendants, above named, alleges:

Count I.

1. That the Office of Price Administration is an agency of the Government of the United States of America, created by the provisions of Section 201(a) of the Emergency Price Control Act of 1942 (50 U.S.C.A. 901 et seq.), as amended, hereinafter referred to as the "Price Control Act," and that Chester Bowles, plaintiff herein, is the duly appointed, qualified and acting Administrator thereof.

2. That jurisdiction of this cause of action is conferred upon the above entitled court by the provisions of Section 205(c) of the Price Control Act, as amended.

3. That, the defendant, M. A. Wyman, doing business as the M. A. Wyman Lumber Company was, at all times, hereinafter mentioned, engaged in the business of buying and selling lumber with his principal place of business in King County within the jurisdiction of this court.

4. That the defendants, M. A. Wyman, M. H. Wyman and Edward Doran, a co-partnership, doing business as the Wyman Mill [37] Company,

were, at all times hereinafter mentioned, engaged in the business of producing West Coast rough softwood lumber with their principal place of business in Snohomish County within the jurisdiction of this court.

5. That, in the judgment of the said Administrator, the defendants from July 11, 1944, to and including December 22, 1944, were engaged in the acts and practices hereinafter described which constituted a violation of Revised Maximum Price Regulation 26 (10 Fed. Reg. 13050), as amended, hereinafter referred to as "RMPR 26" which was issued pursuant to Section 2(a), Section 202(b), and Section 201(d) of said Price Control Act, and that, therefore, pursuant to Section 205(a) of said Price Control Act the Administrator makes this application for an injunction to enforce compliance with said RMPR 26.

6. That, at all times mentioned herein RMPR 26 was in full force and effect fixing the maximum price that could be charged for Douglas fir, or other West Coast lumber to purchasers for use in the course of trade or business.

7. That, the defendants from July 11, 1944, to and including December 22, 1944, made numerous sales to purchasers for use or consumption in the course of trade or business of Douglas fir at prices in excess of the maximum prices fixed by RMPR 26. That said overcharges are fully set forth in Exhibit "A" which is affixed hereto and made a part hereof as fully as if set forth herein.

Count II.

1. Plaintiff incorporates herein and makes a part hereof as fully as if set forth herein Paragraphs 1, 2, 3 and 4 of Count I of this complaint.

2. That the defendant from July 11, 1944, to and including December 22, 1944, were engaged in the acts and practices [38] hereinafter described which constituted a violation of Revised Maximum Price Regulation 26 (10 Fed. Reg. 13050), as amended, hereinafter referred to as "RMPR 26," which was issued pursuant to Section 2(a), Section 202(b), and 201(d) of said Price Control Act, and that, therefore, pursuant to Section 205(e) of said Price Control Act the Administrator brings this action for treble damages.

3. That, at all times mentioned herein RMPR 26 was in full force and effect fixing the maximum price that could be charged for Douglas fir, or other West Coast lumber to purchasers for use in the course of trade or business.

4. That, the defendants, being sellers subject to the said regulation, made numerous sales from July 11, 1944, to and including December 22, 1944, to purchasers for use or consumption in the course of trade or business at prices in excess of the maximum prices fixed by the regulation, which sales are fully set forth in Exhibit "A" which is affixed hereto and made a part hereof by reference as fully as if set forth herein. That the amount by which

the prices charged by the defendants exceeds the maximum prices provided under RMPR 26 is \$19,130.89.

Wherefore plaintiff prays for:

1. A preliminary and final injunction against said defendants, their agents, employees, and any and all persons acting in concert or participation with said defendants:

A. Ordering and directing them forthwith to fix the prices of all Douglas fir or other West Coast lumber sold by them in accordance with the applicable provisions of Revised Maximum Price Regulation 26 (10 Fed. Reg. 13050).

B. Ordering and directing them to do every other act required to be done by said regulation, and to do every act required to be done by any other applicable regulation or order relating to prices, heretofore or hereafter issued pursuant to said Price Control Act, as amended, or extended.

C. Enjoining and restraining them permanently from doing any other act prohibited by said regulation and from doing any act prohibited by any other applicable regulation or order relating to prices, heretofore or hereafter issued pursuant to said Price Control Act, as amended or extended.

2. Judgment in favor of the plaintiff and against the defendants for three times the overcharges which sum is \$57,392.57.

3. And for such other and further relief as the court may deem just and equitable in the premises.

/s/ ANDREW H. HITCHCOCK,
Enforcement Attorney.

/s/ DANIEL M. REAUGH,
District Enforcement
Attorney,

Attorneys for Plaintiff.

[Attached exhibit is identical with Exhibit A as set out in full in Amended Complaint for Injunction and Treble Damages, and appears on pages 20 to 22.]

[Endorsed]: Filed Feb. 27, 1946.

District Court of the United States for the Western
District of Washington, Northern Division.

Civil Action File No. 1279

CHESTER BOWLES, Administrator,
Office of Price Administration,
Plaintiff,

vs.

M. A. WYMAN, d.b.a. M. A. Wyman Lumber
Company, et al.,
Defendants.

SUMMONS

To the above named Defendants:

You are hereby summoned and required to serve upon A. H. Hitchcock plaintiff's attorney, whose address 3319 White-Henry-Stuart Building, Seattle, Washington, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[Seal] MILLARD P. THOMAS,
Clerk of Court.

By /s/ SIGFRIED PETTYS,
Deputy Clerk.

Date: Feb. 27, 1946.

RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the 27th day of February, 1946, I received the within summons, together with copy of Second Amended Complaint for Injunction and Treble Damages and that thereafter I served the same on the therein named M. W. Wyman and M. H. Wyman by handing to and leaving a true and correct copy thereof with each of them personally at Seattle, Washington on the 28th day of February, 1946 and I also served the same on the therein named Edward Doran by handing to and leaving a true and correct copy thereof with him personally at Darrington, Washington on the 5th day of March, 1946.

J. S. DENISE,

United States Marshal.

By /s/ J. M. SCHWERDFIELD,

Deputy United States Marshal.

Marshal's Fees: Travel \$18.96; Service \$6.00;
Total \$24.96.

[Endorsed]: Filed March 15, 1946.

[Title of District Court and Cause.]

MOTION TO QUASH SERVICE OF SUMMONS
AND SECOND AMENDED COMPLAINT
ON M. H. WYMAN OR TO DISMISS

Comes now M. H. Wyman, defendant above named, and appearing specially for the purpose of this motion and for no other purpose, respectfully moves this Court to quash the service of the summons and second amended complaint in the above cause made on said M. H. Wyman on February 28, 1946, or in the alternative to dismiss said M. H. Wyman with prejudice, on the ground that said M. H. Wyman was by formal order of this Court on February 15, 1946, dismissed from the above cause, and no appeal has been taken therefrom, and said order is now *res adjudicata*; and on the further ground set out in said defendant's motion to quash the service of the summons and amended complaint herein; and on the further ground that neither Count I or Count II of said second amended complaint alleges facts sufficient to state a claim on which relief can be granted against said M. H. Wyman; and on the further ground that this Court has no jurisdiction of the subject matter of this action or of the person of said defendant; and on the further ground that it affirmatively appears from the records herein that said second amended complaint was not served or filed within the time limited by law.

This motion is based upon the records and files in the above entitled case.

C. E. HUGHES,

Attorney for M. H. Wyman.

Copy recd. March 13, 1946

A. H. HITCHCOCK,

Attorney for Plaintiff.

Copy recd. March 13, 1946

OGDEN & OGDEN,

By RAYMOND D. OGDEN, Jr.,

Attorney for Edward Doran.

[Endorsed]: Filed March 18, 1946. [48]

[Title of District Court and Cause.]

MOTION TO QUASH SERVICE OF SUMMONS
AND SECOND AMENDED COMPLAINT
ON EDWARD DORAN OR TO DISMISS

Comes now Edward Doran, defendant above named, and appearing specially for the purpose of this motion and for no other purpose, respectfully moves this Court to quash the service of the summons and second amended complaint in the above cause made on said Edward Doran on February 28, 1946, or in the alternative to dismiss said Edward Doran with prejudice, on the ground that said Edward Doran was by formal order of this Court on February 15, 1946, dismissed from the above cause, and no appeal has been taken therefrom, and

said order is now res adjudicata; and on the further ground set out in said defendant's motion to quash the service of the summons and amended complaint herein; and on the further ground that neither Count I or Count II of said second amended complaint alleges facts sufficient to state a claim on which relief can be granted against the said Edward Doran; and on the further ground that this Court has no jurisdiction of the subject matter of this action or of the person of said defendant; and on the further ground that it affirmatively appears from the records herein that said second amended complaint was not served or filed within the time limited by law.

This Motion is based upon the record and files in the above entitled case.

OGDEN & OGDEN,
/s/ RAYMOND D. OGDEN, Jr.,
Attorneys for Defendant,
Edward Doran [49]

Copy Recd. 3/22/46

C. E. HUGHES,
By E. L. L.

Copy Received 3/22/46

A. H. HITCHCOCK

[Endorsed]: Filed March 22, 1946. [50]

[Title of District Court and Cause.]

MOTION TO DISMISS COUNTS I AND II OF
THE SECOND AMENDED COMPLAINT

Come now M. A. Wyman and M. H. Wyman, both appearing specially for the purpose of this motion and for no other purpose, and each separately moves against plaintiff's second amended complaint as follows:

1. To dismiss Count I thereof, on the ground that said Count does not allege facts sufficient to warrant any need or justification for the issuance of a mandatory injunction or any other injunction against said defendants or either of them, nor state a claim upon which relief can be granted; and on the further ground that it affirmatively appears from second amended complaint that none of said defendants are now, or have at any time since December 22, 1944, violated any regulation, or that said defendants or any of them are now or have at any time since December 22, 1944, threatened to do so, or that plaintiff expects or fears that said defendants will do so in the future; and on the further ground that said Count I of the second amended complaint constitutes a new and different cause of action, that is to say Count I of the original and amended complaints were based solely on an alleged violation of Maximum Price Regulation 539, governing the price of services, while Count I of the second amended complaint filed herein [51] Feb-

ruary 27, 1946, is based solely on an alleged violation of Revised Maximum Price Regulation 26, governing the price of commodities; and on the further ground that said second amended complaint was not served or filed within the time limited by law; and on the further ground that this Court has no jurisdiction of the subject matter of this action or of the person of said defendants, or either of them.

2. To dismiss Count II thereof on the ground that said Count does not allege facts sufficient to constitute a cause of action against said defendants, or either of them, nor state a claim upon which relief can be granted; and on the further ground that Count II of said second amended complaint constitutes a new and different cause of action, that is to say Count II of the original and amended complaints were based solely on an alleged violation of Maximum Price Regulation 539, governing the price of services, while Count II of the second amended complaint filed herein February 27, 1946, is based solely on an alleged violation of Revised Maximum Price Regulation 26, governing the price of commodities; and on the further ground that said second amended complaint was not filed or served within the time limited by law, and in addition thereto it was filed after Count II of said amended complaint was dismissed for failure to state any claim upon which relief could be granted; and on the further ground that this Court has no jurisdiction of the subject matter of this action, or of the person of said defendants or either of them.

These motions are made separately by said M. A. Wyman and M. H. Wyman, and are based upon the records and files in the above cause.

C. E. HUGHES,
Attorney for M. A. Wyman and
M. H. Wyman [52]

Copy received March 15, 1946

A. H. HITCHCOCK,
Attorney for Plaintiff.

Copy Received March 13, 1946

OGDEN & OGDEN,
By RAYMOND D. OGDEN, Jr.,
Attorneys for Edward Doran.

[Endorsed]: Filed March 18, 1946. [53]

[Title of District Court and Cause.]

MOTION TO DISMISS COUNTS I AND II OF
THE SECOND AMENDED COMPLAINT

Comes Now Edward Doran, defendant above named, and appearing specially for the purpose of this motion and for no other purpose, and moves against plaintiff's second amended complaint as follows:

1. To dismiss Count I thereof, on the ground that said count does not allege facts sufficient to warrant any need for justification for the issuance of a mandatory injunction or any other injunction

against said defendant, nor state a claim upon which relief can be granted; and on the further ground that it affirmatively appears from said second amended complaint that said defendant is not now, or has he at any time since December 22, 1944, violated any regulation, or that said defendant is now or has at any time since December 22, 1944, threatened to do so, or that plaintiff expects or fears that said defendant will do so in the future; and on the further ground that said Count I of the second amended complaint constitutes a new and different cause of action, that is to say, Count I of the original and amended complaints were based solely on an alleged violation of Maximum Price Regulation 539, governing the price of services, while Count I of the second amended complaint filed herein February 27, 1946, is based solely on an alleged violation of Revised Maximum Price Regulation 26, governing the price of commodities; and on the further [54] ground that said second amended complaint was not served or filed within the time limited by law; and on the further ground that this Court has no jurisdiction of the subject matter of this action or of the person of said defendant.

2. To dismiss Count II thereof on the ground that said Count does not allege facts sufficient to constitute a cause of action against said defendant, nor to state a claim upon which relief can be granted; and on the further ground that Count II of said second amended complaint constitutes a new

and different cause of action, that is to say, Count II of the original and amended complaints were based solely on an alleged violation of Maximum Price Regulation 539, governing the price of services, while Count II of the second amended complaint filed herein February 27, 1946, is based solely on an alleged violatoin of Revised Maximum Price Regulation 26, governing the price of commodities; and on the further ground that said second amended complaint was not filed or served within the time limited by law, and in addition thereto it was filed after Count II of said amended complaint was dismissed for failure to state any claim upon which relief could be granted; and on the further ground that this Court has no jurisdiction of the subject matter of this action, or of the person of said defendant.

This Motion is based upon the records and files in the above cause.

OGDEN & OGDEN,
/s/ RAYMOND D. OGDEN, Jr.,
Attorneys for defendant,
Edward Doran.

Copy received 3/24/46

A. H. HITCHCOCK

Copy received 3/22/46

C. E. HUGHES,
by E. L. L.

[Endorsed]: Filed March 22, 1946. [55]

[Title of District Court and Cause.]

ORDER FOR SUBSTITUTION

This matter having come on regularly for hearing this day before the undersigned, one of the Judges of the above-entitled court, and it appearing to the court that Chester Bowles, plaintiff, a party in this action, has resigned from the office of Price Administrator, of the Office of Price Administration, effective February 29, 1946; that his resignation was duly accepted and that said Paul A. Porter entered upon the duties of said office on February 26, 1946, and is now lawfully acting as Administrator of the Office of Price Administration; that there is substantial need of continuing and maintaining this cause by him as successor in office to Chester Bowles as Administrator of the Office of Price Administration for the reason that this action relates to the present and future discharge of the office of Administrator of the Office of Price Administration and is important in the administration and enforcement of the Emergency Price Control Act; that good and sufficient notice of the plaintiff's motion for substitution has been given to all interested parties, and the court being fully advised in the premises, now therefore it is

Ordered that Paul A. Porter, Administrator of the Office of Price Administration, is substituted as

plaintiff in this action in the place and stead of
Chester Bowles.

Done In Open Court this 30th day of March,
1946.

JOHN C. BOWEN,
Judge.

Presented by:

JOE S. PEARSON.

[Endorsed]: Filed March 30, 1946. [56]

[Title of District Court and Cause.]

ORDER ON MOTIONS OF M. H. WYMAN AND
EDWARD DORAN TO QUASH SERVICE
OF SUMMONS AND SECOND AMENDED
COMPLAINT

This matter having come on duly and regularly
to be heard on motions of M. H. Wyman and
Edward Doran to Quash Service of Summons and
Second Amended Complaint in the above cause,
made on February 28, 1946, on the ground that said
service was made on M. H. Wyman and Edward
Doran in their individual capacity, plaintiff appear-
ing by his Attorneys, Andrew H. Hitchcock and
James W. Porter; and M. H. Wyman appearing
specially by his Attorney, C. E. Hughes; and
Edward Doran appearing specially by his Attor-
neys, Ogden & Ogden; and the Court having heard
the statement of plaintiff's Attorney that there was
no intention on the part of the plaintiff to serve

M. H. Wyman and Edward Doran in their individual capacity but rather that they were joined as members of a co-partnership, and for no other purpose, and argument having been heard for and against said motions, and this Court being duly advised in the premises;

It Is Therefore Ordered and Adjudged: [57]

That the Motions of M. H. Wyman and Edward Doran to Quash the Service of the Summons and Second Amended Complaint as to them in their individual capacity in the above cause be, and they are, hereby granted. Exception allowed defendants.

Done In Open Court this 12th day of August, 1946.

JOHN C. BOWEN,

United States District Judge.

Approved and presented by:

ANDREW H. HITCHCOCK.

JAMES W. PORTER,

Attorneys for Plaintiff.

Approved:

.....

Attorney for M. H. Wyman.

.....

Attorneys for Edward Doran.

Copy received 8/12/46.

C. E. HUGHES,

Attorney for M. H. Wyman.

Copy received 8/12/46.

RAYMOND D. OGDEN, JR.,

Attorney for Edward Doran.

[Endorsed]: Filed Aug. 12, 1946. [58]

[Title of District Court and Cause.]

ORDER ON DEFENDANTS' MOTIONS TO
DISMISS COUNTS I AND II OF THE
SECOND AMENDED COMPLAINT

This matter having come on duly and regularly to be heard on the motions of M. A. Wyman, M. H. Wyman and Edward Doran, all appearing specially for the purpose of said Motions and for no other purpose, Plaintiff appearing by his attorneys, Andrew H. Hitchcock and James W. Porter; M. A. Wyman and M. H. Wyman appearing specially herein by their attorney, C. E. Hughes; and Edward Doran appearing specially by his attorneys, Ogden & Ogden, and this Court having heard argument for and against said Motions made separately as to each of said Defendants, and being duly advised in the premises;

It Is, Therefore, Ordered and Adjudged that said Motions of M. A. Wyman to dismiss Counts I and II of Plaintiff's Second Amended Complaint be, and they are, hereby denied without prejudice, however, to renew said Motions at the end of trial.

It is therefore Ordered and Adjudged that the Motions of M. H. Wyman and Edward Doran, Defendants above-named, to dismiss Counts I and II of Plaintiff's Second Amended Complaint on file herein be, and each of said Motions is, [59] hereby denied insofar as their partnership liability is concerned, but said motion to dismiss Counts I and II

so far as concerns any and all other liability other than partnership liability of defendants M. H. Wyman and Edward Doran is granted.

Done In Open Court this 12th day of August, 1946.

JOHN C. BOWEN,
District Judge.

Approved and presented by:

ANDREW H. HITCHCOCK,
Attorney for Plaintiff.

Copy received:

OGDEN & OGDEN,
By RAYMOND D. OGDEN, JR.,
Attorneys for Edward Doran.

C. E. HUGHES ,
By E. L. L.,
Attorney for M. A. Wyman
& M. H. Wyman.

[Endorsed]: Filed Aug. 12, 1946. [60]

[Title of District Court and Cause.]

ANSWER OF M. A. WYMAN TO SECOND
AMENDED COMPLAINT

Comes now M. A. Wyman, defendant above-named, individually and in his various capacities mentioned above, without waiving his special appearance herein, and for Answer to Count I of Plaintiff's Second Amended Complaint, denies paragraphs 2, 5, 6 and 7 thereof, and each and every allegation therein contained.

II.

For Answer to Count II of Plaintiff's Second Amended Complaint, said defendant denies Paragraphs 1, 2, 3 and 4 thereof, and each and every allegation contained therein.

For a First Further and Separate Answer and Affirmative Defense to Plaintiff's Second Amended Complaint, and the Whole Thereof, said Defendant Alleges:

I.

That neither Count I nor Count II thereof states a claim against defendant, M. A. Wyman, upon which relief can be granted.

For a Second Further and Separate Answer and Affirmative Defense to Plaintiff's Second Amended Complaint, and the Whole Thereof, said Defendant Alleges:

I.

That the alleged rights of action set forth in Counts I [61] and II thereof introduce new and different causes of action, filed after the expiration of the one year statute of limitations provided in Section 205 of the Emergency Price Control Act of 1942, as amended, and that said new and different causes of action were not commenced within the statutory period required by said Act.

For a Third Further and Separate Answer and Affirmative Defense to Plaintiff's Second Amended Complaint, and the Whole Thereof, said Defendant Alleges:

I.

That if any violations of Revised Maximum Price Regulation No. 26 have occurred, as alleged in plaintiff's Second Amended Complaint, they were neither wilfull nor the result of failure by said defendant to take practicable precautions against the occurrence of such alleged violations.

Wherefore, having fully answered plaintiff's Second Amended Complaint, defendant M. A. Wyman prays that this action be dismissed with prejudice.

C. E. HUGHES,

Attorney for M. A. Wyman.

Copy received 8/16/46.

JAMES W. PORTER,

Attorney for Plaintiff.

[Endorsed]: Filed Aug. 16, 1946. [62]

[Title of District Court and Cause.]

SPECIAL APPEARANCE OF
EDWARD DORAN

Comes now Edward Doran, not in his individual capacity at all, but as a former member of the partnership named herein as one of the defendants, and appears herein specially and not otherwise, as such former member of such partnership, and without waiving his special appearance herein, represents to the Court as follows:

I.

That heretofore, on the 12th day of August, 1946, upon motion of Edward Doran, as an individual, Counts I and II of plaintiff's Second Amended

Complaint were dismissed insofar as any and all liability against him personally was concerned, other than partnership liability.

II.

That on the 12th day of August, 1946, one of the judges of the above-entitled court entered an order quashing the service of Summons and Second Amended Complaint on said Edward Doran insofar as his individual capacity in the above-entitled cause be.

III.

That said Edward Doran alleges that in view of the orders heretofore referred to in Paragraphs I and II hereof, this Court is now without jurisdiction to enter any order or judgment against Edward Doran in any capacity whatsoever.

Wherefore, Edward Doran, still maintaining his special [63] appearance and without submitting himself to the jurisdiction of this Court, prays that the plaintiff take nothing by its cause of action herein against Edward Doran personally, or against Edward Doran as a member of said partnership, or at all.

OGDEN & OGDEN,

By RAYMOND D. OGDEN, JR.,

Attorneys for Edward Doran.

Copy received 8/16/46.

C. E. HUGHES,

Attorney for M. A. Wyman.

Copy received 8/16/46.

JAMES W. PORTER,

Attorney for Plaintiff.

[Endorsed]: Filed Aug. 16, 1946. [64]

[Title of District Court and Cause.]

STIPULATION

The parties hereto by their respective attorneys being desirous of saving the time of this Court with respect to certain matters of fact which are undisputed, desire to stipulate and agree as to the following facts, subject to objection by any party as to materiality or admissibility.

Now Therefore It Is Stipulated And Agreed That:

1. None of the defendants have violated any OPA regulations since December 22, 1944, to the best of the plaintiff's present knowledge.

2. Count II of plaintiff's Second Amended Complaint is an action for treble damages or for a penalty by a civil suit or proceeding.

3. Maximum Price Regulation 539 is a service regulation covering maximum prices for surfacing and kiln drying of lumber. And Revised Maximum Price Regulation 26 is a commodity regulation establishing maximum prices for the sale of a species of lumber known as Douglas Fir and other West Coast lumber.

4. Plaintiff's Amended Complaint was dismissed by order of this Court on February 15, 1946, with leave to amend within two weeks. His Second Amended Complaint was filed on February 27, 1946, within the time allowed for filing under [65] said order. The last alleged violation named in both of these Complaints, took place December 22, 1944. The Statute of Limitations set forth in

Section 205(e) of the Emergency Price Control Act of 1942, as amended, provides that action must be instituted within one year from the date of the last violation.

5. M. A. Wyman was the principal owner and manager of the M. A. Wyman Lumber Company, White-Henry-Stuart Building, Seattle, Washington, from July 10, 1944, to and including, December 22, 1944.

6. M. A. Wyman, M. H. Wyman and Edward Doran, as co-partners, were operating the Wyman Mill Company, located at Granite Falls, Washington, for the above-mentioned period.

7. M. A. Wyman during the period mentioned in paragraph 5, hereof, was ~~the principal~~ a 50% stockholder and president of the Granite Falls Planing Mill, a corporation, with its operation located near Granite Falls, and said corporation had a representative in the office of the Wyman Lumber Company in Seattle, Washington. That the M. A. Wyman, mentioned in Paragraphs 5 and 6, hereof and also as president of the Granite Falls Planing Mills, is one and the same person.

8. That Granite Falls Planing Mill during 1944 was located within 500 feet of the Wyman Mill Company.

9. That Edward Doran was superintendent of the Wyman Mill Company and the Granite Falls Planing Mill during 1944.

10. That the Granite Falls Planing Mill bought the surfacing machinery from the Wyman Mill Company, and also occupied space which prior to

its incorporation had been occupied by a portion of the Wyman Mill Company.

11. The M. A. Wyman Lumber Company sold, shipped, invoiced and received payment for 3,122,732 feet board measure of rough lumber from July 10, 1944, to and including December 22, 1944. That these figures were obtained from invoices, the [66] originals of which are now within the possession of the defendants, herein, and which footage is further shown in Exhibit "A" appended to plaintiff's Second Amended Complaint. That it received payment for this lumber in the sum of \$89,427.38. That said latter sum is in accordance with the prices set forth in RMPR 26.

12. The Granite Falls Planing Mill invoiced and received payment in the sum of \$22,955.44 for surfacing charges on 3,122,732 feet board measure of lumber from July 10, 1944, to and including December 22, 1944, being the same lumber mentioned in paragraph 11. That these figures were obtained from invoices made out in the offices of the M. A. Wyman Lumber Company, White-Henry-Stuart Building, Seattle, Washington, the originals of which are now in the possession of the defendants herein, and which footage is further shown in Exhibit "A" appended to plaintiff's Second Amended Complaint.

13. During this period with respect to all of these shipments heretofore mentioned, a representative of the Granite Falls Planing Mill, using the office of the Wyman Lumber Company, made out the Bills of Lading for the surfaced lumber pro-

viding for shipment of said lumber from the Granite Falls Planing Mill to the various customers, showing the M. A. Wyman Lumber Company as shipper. That such procedure was customary at said time.

14. The invoices for rough lumber, the invoices for surfacing, and the Bills of Lading all bear the same date for each shipment, and the footage for the rough and surfaced lumber is the same in each case.

15. All sales concerned in this suit were made to purchasers who operated retail or wholesale lumber yards and were for use in the course of said purchasers' business. [67]

In Witness Whereof, the undersigned have caused their hands to be affixed this 24th day of September, 1946, at the City of Seattle, Washington.

ANDREW H. HITCHCOCK,
JAMES W. PORTER,
Attorneys for Plaintiff.

By
Defendant.

/s/ C. E. HUGES,
Attorney for Defendant.

[Endorsed]: Filed Sept. 26, 1946. [68]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial in the above-entitled Court sitting without a jury, Honorable Howard C. Speakman, U. S. District Court Judge, presiding, and Andrew H. Hitchcock and James W. Porter appearing for the Plaintiff, and C. E. Hughes, George Laymen and Ogden & Ogden appearing for the defendants, and said action having been tried on September 26, 27, and 28, 1946, and evidence both oral and documentary having been introduced, and said action having been submitted for decision, the Court being fully advised, now makes its Findings of Fact as follows:

FINDINGS OF FACT

I.

That the Office of Price Administration is an agency of the Government of the United States of America, created by the provisions of Section 201(a) of the Emergency Price Control Act of 1942 (50 U.S.C.A. 901 et seq.), as amended, and that Paul A. Porter, plaintiff herein, is the duly appointed, qualified and acting Administrator thereof.

II.

That jurisdiction of this cause of action is conferred upon [69] the above-entitled Court by the

provisions of Section 205(c) of the Price Control Act, as amended.

III.

That the defendant, M. A. Wyman, doing business as the M. A. Wyman Lumber Company, was at all times material to this suit, engaged in the business of buying and selling lumber with his principal place of business in the White-Henry-Stuart Building, in King County, within the jurisdiction of this Court.

IV.

That the defendants, M. A. Wyman, M. H. Wyman and Edward Doran, a co-partnership doing business as the Wyman Mill Company, were at all times material to this case, engaged in the business of producing Douglas Fir and other West Coast soft wood lumber, with their principal place of business Snohomish County, within the jurisdiction of this Court.

V.

For all periods involved herein, Revised Maximum Price Regulation 26 established the maximum prices that could be charged for Douglas Fir or other West Coast surfaced lumber to purchasers for use or consumption in the course of trade or business. These prices were set forth in the Price Tables under Article V of said Regulation.

VI.

Defendants made numerous sales of Douglas Fir and other West Coast surfaced lumber between

July 11, 1944, to and including December 22, 1944, to purchasers for use or consumption in the course of trade or business at prices in excess of the maximum prices fixed by the Price Tables under Article V of RMPR 26.

VII.

The total footage sold by the defendants was 3,122,732 feet board measure. [70]

VIII.

That the defendants incorporated a company, the Granite Falls Planing Mill, in January 1944, which company authorized the issuance of 240 shares of capital stock, and this capital stock was owned from July to December, 1944, as follows:

M. A. Wyman	120 shares
M. H. Wyman	60 shares
Edward Doran	60 shares

IX.

For the period involved herein, M. A. Wyman was president of the said Granite Falls Planing Mill. This Planing Mill was operated at Granite Falls, Washington, within ~~500~~ 1000 feet of the Wyman Mill Company, and said Granite Falls Planing Mill bought its surfacing machinery and the space it occupied from the Wyman Mill Company.

X.

That Edward Doran was the Superintendent of

both the Wyman Mill Company and the Granite Falls Planing Mill during this period.

XI.

That said Granite Falls Planing Mill, on May 3, 1944, made application directed to the Regional Office of the Office of Price Administration, at Seattle, for authorization to operate as a custom mill under the provisions of Supplementary Service Regulation 27 to Maximum Price Regulation 165. This application contained no information about the ownership of the Granite Falls Planing Mill.

XII.

Maximum Price Regulation 539 replaced Supplementary Service Regulation 27 to Maximum Price Regulation 165 on or about June 5, 1944. The Granite Falls Planing Mill never filed any other application for permission to charge custom milling prices pursuant to the provisions of Maximum Price Regulation 539.

XIII.

The application of the Granite Falls Planing Mill hereinbefore [71] mentioned was finally denied and returned to the Granite Falls Planing Mill by said Office of Price Administration on May 5, 1945. This was the first notice to said Granite Falls Planing Mill of its denial.

XIV.

The total amount of overcharges made by the defendants on the sales of surfaced Douglas Fir and other West Coast lumber for use or consumption in the course of trade or business for the period commencing July 11, 1944, to and including December 22, 1944, aggregated the total sum of \$19,130.67.

XV.

The overcharges made by the defendants on the sales referred to herein were not wilfull, and the defendants took reasonable precautions to avoid their occurrence.

XVI.

That the Granite Falls Planing Mill from July to December, 1944, as to its stockholders and officers, was composed of the same people who at that time owned the Wyman Mill Company and the M. A. Wyman Lumber Company. The Granite Falls Planing Mill was used for the purpose of securing prices in excess of the prices permitted the defendants by the provisions of the Pricing Tables under Article V of Revised Maximum Price Regulation 26.

XVII.

That the defendants above-named have not violated nor threatened to violate Revised Maximum Price Regulation 26 or Maximum Price Regulation 539 since December 22, 1944, nor has plaintiff since that date had any reason to believe that any of said defendants would violate either of said regulations.

CONCLUSIONS OF LAW

As Conclusions of Law from the foregoing facts, the Court finds that:

I.

That the defendants are entitled to have Count I of Plaintiff's Second Amended Complaint dismissed.

II.

Plaintiff is entitled to judgment against the defendants and each of them in the sum of \$19,130.67 and his costs herein.

III.

That this Court shall retain jurisdiction of this action for any appropriate proceedings. Judgment is hereby ordered to be entered accordingly.

Dated this 1st day of October, 1946.

HOWARD C. SPEAKMAN,
United States District Court
Judge.

Receipt of a copy of the within and foregoing Proposed Findings of Fact and Conclusions of Law is acknowledged this 1st day of October, 1946, 10.09 a.m.

C. E. HUGHES,
Attorney for Defendant.

OGDEN & OGDEN,
Attorney for Defendant
Edward Doran.

[Endorsed]: Filed Oct. 1, 1946. [73]

In the District Court of the United States for
the Western District of Washington, Northern
Division

Civil Action No. 1279

PAUL A. PORTER, Administrator, Office of
Price Administration,

Plaintiff,

vs.

M. A. WYMAN, d/b/a M. A. WYMAN LUMBER
COMPANY, et al.,

Defendants.

JUDGMENT

Plaintiff having filed herein a Complaint for treble damages, and an injunction, pursuant to Sections 205(a) and (e) of the Emergency Price Control Act of 1942, as amended, and defendant having appeared herein, the case having been tried to the Court, evidence having been taken on behalf of both parties, the Court having examined the files, heard the statements of counsel, and being fully advised in the premises,

It Is Hereby Ordered, Adjudged and Decreed, that:

I.

That Count I of plaintiff's Second Amended Complaint be, and the same is, hereby dismissed.

II.

Judgment be hereby entered in favor of the plaintiff and against the defendants and each of them for the sum of \$19,130.67 and for his costs herein.

Done In Open Court this 1st day of October, 1946.

HOWARD C. SPEAKMAN,
U. S. District Court Judge.

ANDREW H. HITCHCOCK,
JAMES W. PORTER,
Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 1, 1946. [74]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes now the defendant Edward Doran, and still reserving his special appearance, respectfully moves this Honorable Court for a new trial under Rule 59, Federal Rules of Civil Procedure, and Local Rule 48, on the following grounds:

I.

Insufficiency of the evidence to justify the Findings of Fact and Conclusions of Law as respects the defendant, Edward Doran, in this, that the evidence fails to connect Edward Doran personally with any violations of Revised Maximum Price Regulation 26 or Maximum Price Regulation 539.

II.

Errors of law occurring at the trial as follows:

The Court erred in entering any judgment against defendant Edward Doran on the ground and for the reason that the said Edward Doran was not a party to the within entitled cause in that he had been specifically dismissed from said cause of action; that on the 15th day of February, 1946, the Honorable John Bowen entered a final order in this cause, reciting among other things, "It is further ordered and adjudged that M. H. Wyman and Edward Doran, defendants above-named, be and they are hereby dismissed from said suit as individuals." Again on the 12th day of August, 1946, the Honorable John Bowen entered a final order and judgment as respects Edward Doran, in the within entitled cause, which order and judgment recites among other things [76] as follows: "That the motions of M. H. Wyman and Edward Doran to quash the service of the Summons and Second Amended Complaint, as to them in their individual capacity, in the above-entitled cause, be and the same are hereby granted;" that in spite of these orders, from which no appeal has been perfected, this Court did enter a judgment reading as follows: "Judgment is hereby entered in favor of the plaintiff and against the defendants, and each of them, for the sum of \$19,130.67 and for his costs herein." That in so doing this Court acted beyond its legal power as respects Edward Doran, and that the entering of a personal judgment against Edward

Doran when the Court had no jurisdiction over him, and he had been specifically dismissed from the cause, constitutes error of law, and such error should be immediately remedied.

This Motion is based upon the records and files in the within entitled cause.

OGDEN & OGDEN,
Attorneys for Defendant
Edward Doran.

Copy received 10/9/46.

C. E. HUGHES,
By E. L. L.

Service accepted 10/9/46.

L. M. PECK.

[Endorsed]: Filed Oct. 9, 1946. [77]

[Title of District Court and Cause.]

AMENDED MOTION FOR NEW TRIAL

Come now defendants above-named, except Edward Doran, and respectfully move this Court for a new trial under Rule 59, Federal Rules of Civil Procedure, and Local Rule 48, on the following grounds:

1. Insufficiency of the evidence to justify the findings, conclusions or judgment. The particulars wherein the evidence is claimed to be insufficient are as follows:

(a) The evidence fails to show that defendants sold any surfaced lumber to any of the alleged buyers between July 11 and December 22, 1944, or that they sold any lumber whatsoever to any of the alleged buyers except rough green lumber.

(b) The evidence fails to show any violation of Revised Maximum Price Regulation 26.

(c) The evidence fails to connect M. A. Wyman with any violation of Revised Maximum Price Regulation 26 or Maximum Price Regulation 539.

(d) The evidence fails to show that Granite Falls Planing Mill, a corporation, was used by the defendants, or any of them, for the purpose of securing prices in excess of RMPR 26 or any other regulation. [78]

(e) The evidence shows an application was made by Granite Falls Planing Mill, a corporation, in good faith on May 3, 1944, addressed to the Regional Office of Price Administration at Seattle, Washington, to operate under MPR 165, supplemental Service Regulation 27, effective May 3, 1944, which regulation was supplanted by MPR 539, effective June 5, 1944. That said application was received and filed by the Office of Price Administration at Seattle May 4, 1944, but said O.P.A. took no action thereon until May 5, 1945, at which time said O.P.A. returned said application to said applicant accompanied by a letter from said O.P.A. notifying said applicant for the first time that said application did not meet the requirements of MPR 539. That said delay and neglect by said O.P.A.

amounts to an estoppel to complain of any violations that may have occurred in the meantime.

2. Errors in law occurring at the trial as follows:

(a) Both the original complaint filed herein July 11, 1945, and the first amended complaint filed herein November 7, 1945, sought recovery for violation of MPR 539, a service regulation. The second amended complaint was filed herein and summons was issued thereon February 27, 1946, after the expiration of the one-year statute of limitations as provided in Sec. 205(e) of the Emergency Price Control Act of 1942 as amended, seeking recovery for violation of RMP 26, a commodity regulation, which amendment constituted a change in the cause of action after the expiration of the statute of limitations, and plaintiff's attempt at trial to show fraud or deceit over defendants' objection further changed the cause of action after the one year statute of limitations had run.

(b) In holding M. A. Wyman personally liable for the acts of Granite Falls Planing Mill, a corporation, merely because he was president thereof, when the evidence showed that he had nothing to do with the prices charged by said corporation or its business activities. [79]

(c) In holding M. H. Wyman and Edward Doran liable in any capacity after they were both dismissed by formal order of this Court.

(d) In permitting any evidence over defendants' objection tending to establish fraud or deceit when none was alleged.

(e) In admitting evidence over defendants' objection as to the operation, ownership or organization of Granite Falls Planing Mill, a corporation, after it had been dismissed as defendant herein by formal order of this Court February 15, 1946.

This motion is made separately as to each of the above grounds and is based upon the three complaints of plaintiff and the answers to the second amended complaint and the stipulation on file herein and the evidence at the trial of this cause.

C. E. HUGHES,

Attorney for Defendants.

Copy received Oct. 7, 1946.

JAMES W. PORTER,

Attorney for Plaintiff.

Copy received Oct. 7, 1946.

OGDEN & OGDEN,

Attorneys for Edward Doran.

[Endorsed]: Filed Oct. 7, 1946. [80]

United States District Court
District of Arizona
Judge's Chambers
Tucson, Arizona

June 19, 1947

Mr. Millard P. Thomas, Clerk
United States District Court
Western District of Washington
P. O. Box 1866
Seattle 11, Washington

Re: No. 1279, Paul A. Porter, etc., v.
M. A. Wyman, etc., et al.

Dear Mr. Thomas:

Please enter an order on the minutes denying all motions for new trial in the above entitled case.

The file is being returned to you under separate cover.

Very truly yours,

HOWARD C. SPEAKMAN.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, June 23, 1947. Millard P. Thomas, Clerk; by Truman Egger, Deputy. [81]

United States District Court, Western District of
Washington, Northern Division

Civil No. 1279

PAUL A. PORTER, Administrator, Office of Price
Administration,

Plaintiff,

vs.

M. A. WYMAN, doing business as M. A. Wyman
Lumber Company, et al.,

Defendants.

ORDER DENYING MOTIONS FOR
NEW TRIAL

The Court having fully considered the motions for a new trial interposed by each of the defendants herein, and the elaborate briefs submitted by the parties, and being fully advised in the premises and having heretofore directed the Clerk to make a docket entry denying said motions and each thereof, it is now

Ordered that said motions for a new trial be and each thereof is hereby denied.

Dated this 24th day of June, 1947.

HOWARD C. SPEAKMAN,
United States District Judge.

Presented by:

JOHN E. BELCHER,
Assistant United States
Attorney.

Approved as to form:

C. E. HUGHES,
Attorney for defendant
M. A. Wyman.

OGDEN & OGDEN,
Attorneys for defendant
Edward Doran.

[Endorsed]: Filed July 7, 1947. [82]

[Title of District Court and Cause.]

AUTHORIZATION

I, Howard C. Speakman, United States District Judge for the State of Arizona, before whom the above entitled cause was tried at Seattle, Washington, do hereby authorize the Honorable John C. Bowen or the Honorable Lloyd Black, both United States District Judges for the Western District of Washington, to approve appeal bond and supersedeas bond on appeal in the above cause in the total sum of \$20,250.00 and to sign such other orders in the above cause as either of them may deem

proper or necessary, in order to perfect an appeal of said cause to the United States Circuit Court of Appeals for the Ninth Circuit.

HOWARD C. SPEAKMAN,
United States District Judge
for the State of Arizona.

[Endorsed]: Filed July 7, 1947. [83]

[Title of District Court and Cause.]

ORDER APPROVING WITHDRAWAL AND
SUBSTITUTION OF COUNSEL

This Matter having come on regularly to be heard on the ex parte application of Ogden & Ogden, attorneys for Edward Doran, one of the above named defendants seeking an order approving the withdrawal and substitution of themselves as counsel for Edward Doran on appeal; and it appearing to the court that C. E. Hughes has been through the entire proceedings of this case and now is counsel for all of the other defendants in the above cause; and it further appearing to the court that it is the desire of Edward Doran to have said C. E. Hughes act as his counsel in place and stead of Ogden & Ogden in the appeal of this case to the Circuit Court of Appeals, Ninth Circuit; and it further appearing to the court that Ogden & Ogden are desirous of withdrawing as attorneys for Edward Doran in the appeal of this case to the Circuit Court of Appeals, Ninth Circuit,

Now, Therefore, it is Ordered that Ogden & Ogden are hereby permitted to withdraw as attorneys of record for Edward Doran, one of the defendants named in the above entitled cause on appeal; and

It is further Ordered that C. E. Hughes may be substituted to act as counsel for Edward Doran, one of the defendants named in the above entitled cause on appeal in place and stead of Ogden & Ogden.

Done in Open Court this 8th day of July, 1947.

LLOYD L. BLACK,

United States District Judge.

Presented by:

/s/ RAYMOND D. OGDEN, JR.,

Of Ogden & Ogden, attorneys

for Edward Doran, one of

the above named

Defendants.

Approved:

/s/ C. E. HUGHES,

Attorney for remaining

Defendants.

Approved as to form:

/s/ JOHN E. BELCHER,

Attorney for Plaintiff.

[Endorsed]: Filed July 8, 1947. [84]

[Title of District Court and Cause.]

WITHDRAWAL OF ATTORNEYS

Comes now Ogden & Ogden and hereby withdraws as counsel on appeal for Edward Doran, one of the defendants above named in the above entitled cause.

OGDEN & OGDEN,
/s/ RAYMOND D. OGDEN, SR.,
/s/ RAYMOND D. OGDEN, JR.

Copy received July 8, 1947.

C. E. HUGHES,
Attorney for all Defendants
except Edward Doran.

JOHN E. BELCHER,
Assistant U. S. Attorney.

[Endorsed]: Filed July 8, 1947. [85]

[Title of District Court and Cause.]

SUBSTITUTION OF ATTORNEYS

The undersigned hereby appears as attorney of record for Edward Doran, defendant above named, without waiving the special appearance filed herein by said defendant.

C. E. HUGHES,
Attorney for Edward Doran.
1026 Henry Building,
Seattle, Washington.

Received a true copy this 9th day of June, 1947.

JOHN E. BELCHER,
Assistant U. S. Attorney.

[Endorsed]: Filed July 9, 1947. [86]

[Title of District Court and Cause.]

ORDER FOR SUBSTITUTION OF
PARTY PLAINTIFF

This Matter came on regularly before the Court pursuant to due notice, upon the motion of the United States Attorney for an order substituting the United States of America as party plaintiff in the place and stead of Paul A. Porter, the plaintiff being represented by J. Charles Dennis, United States Attorney, and John E. Belcher, Assistant United States Attorney, and the defendant being represented by C. E. Hughes, the Court having heard the argument of respective counsel and being fully informed, it is

Ordered that the United States of America be and it is hereby substituted as party plaintiff in the above-entitled cause, to which defendant excepts and its exception is allowed.

Done in Open Court this 9th day of July, 1947.

LLOYD L. BLACK,

United States District Judge.

Presented by:

/s/ JOHN E. BELCHER,

Assistant United States Attorney.

[Endorsed]: Filed July 9, 1947. [87]

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 1279

UNITED STATES OF AMERICA,
Plaintiff,

vs.

M. A. WYMAN, d/b/a M. A. Wyman Lumber
Company, et al.,

Defendants.

NOTICE OF APPEAL

Notice Is Hereby Given that N. A. Wyman, M. A. Wyman, doing business as M. A. Wyman Lumber Company, and M. A. Wyman, M. H. Wyman and Edward Doran, doing business as the Wyman Mill Company, defendants above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit, from Paragraph II of the final judgment entered and filed in this action on October 1, 1946, awarding judgment in favor of plaintiff and against said defendants and each of them in the sum of \$19,130.67 and costs, and also appeal

from the docket entry denying defendants' motion for a new trial entered June 23, 1947.

Dated at Seattle, Washington, July 14, 1947.

C. E. HUGHES,

Attorney for all the
Defendants,

1026 Henry Building,
Seattle, Washington.

Received a true copy, July 14, 1947.

JOHN E. BELCHER,

Assistant U. S. Attorney.

[Endorsed]: Filed July 14, 1947. [88]

[Title of District Court and Cause.]

ORDER FIXING SUPERSEDEAS BOND
ON APPEAL

This matter coming on for hearing to fix the amount of supersedeas bond of defendants on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and it appearing to this Court from the "Authorization" filed herein by the Honorable Howard C. Speakman, United States District Judge for the State of *Nevada*, before whom the above cause was tried at Seattle, Washington, that authority has been granted the undersigned to approve the appeal bond and supersedeas bond on appeal of defendants the above cause in the total sum of \$20,250.00.

It is therefore, Ordered and Adjudged that defendants' appeal bond and supersedeas bond on

appeal to the United States Circuit Court of Appeals for the Ninth Circuit be and it is hereby fixed in the total sum of \$20,250.00.

One in Open Court July 14th, 1947.

ROGER T. FOLEY,
District Judge.

Approved and presented by:

C. E. HUGHES,
Attorney for Defendants.

Approved by:

JOHN E. BELCHER,
Assistant U. S. Attorney and
Attorney for Plaintiff.

[Endorsed]: Filed July 14, 1947. [89]

[Title of District Court and Cause.]

APPEAL AND SUPERSEDEAS BOND

Know All Men by These Presents:

That we, M. A. Wyman doing business as M. A. Wyman Lumber Company and M. A. Wyman, M. H. Wyman and Edward Doran doing business as The Wyman Mill Company and M. A. Wyman, as Principals, and General Casualty Company of America, as surety, acknowledge ourselves to be jointly indebted to United States of America, appellee in the above cause, in the sum of Twenty Thousand Two Hundred Fifty and 00/100 Dollars (\$20,250.00) conditioned that, whereas, on the 1st day of October, 1946, in the District Court of the United States for the Western District of Wash-

ington, Northern Division, in a suit depending in the court, wherein Paul A. Porter, Administrator, Office of Price Administration, was plaintiff and M. A. Wyman d/b/a M. A. Wyman Lumber Company and M. A. Wyman, M. H. Wyman and Edward Doran d/b/a The Wyman Mill Company, and M. A. Wyman were defendants, numbered on the civil docket as 1279, a judgment was rendered against the said M. A. Wyman d/b/a M. A. Wyman Lumber Company and M. A. Wyman, M. H. Wyman and Edward Doran d/b/a The Wyman Mill Company, and M. A. Wyman, and whereas in said suit so depending there was entered by the court on June 23, 1947, a docket entry denying defendants' motion for a new trial, and the United States of America having been substituted as plaintiff in lieu of Paul A. Porter, Administrator Office of Price Administration, and the said M. A. Wyman d/b/a, M. A. Wyman Lumber Company and M. A. Wyman, M. H. Wyman and Edward Doran d/b/a The Wyman Mill Company and M. A. Wyman, having filed in the office of the clerk of the said district court a notice of appeal to the U. S. Circuit Court of Appeals for the Ninth Circuit both in respect of said judgment and said order denying motion for a new trial.

Now, the condition of the above obligation is such that if the said M. A. Wyman d/b/a M. A. Wyman Lumber Company and M. A. Wyman, M. H. Wyman and Edward Doran d/b/a The Wyman Mill Company and M. A. Wyman, shall prosecute their appeal to effect and satisfy the said judg-

ment in full together with costs, interest and damages for delay, if for any reason the appeal is dismissed, or if the judgment is affirmed, and satisfy in full such modification of the judgment and such costs, interest and damages as the appellate court may adjudge and award, then the above obligation is void, else to remain in full force and effect.

Dated at Seattle, Washington, this 14th day of July, 1947.

M. A. WYMAN d/b/a
M. A. WYMAN LUMBER
COMPANY,
M. A. WYMAN,
M. H. WYMAN and
EDWARD DORAN d/b/a
THE WYMAN MILL
COMPANY,
M. A. WYMAN.

By /s/ C. E. HUGHES,
Their Attorney.

[Corporate Seal]

GENERAL CASUALTY
COMPANY OF AMERICA,
/s/ R. M. SULLIVAN,
Attorney-in-Fact.

Approved:

JOHN E. BELCHER,
Assistant U. S. Attorney.

Approved this 14th day of July, 1947.

ROGER T. FOLEY,
United States District Judge.

[Endorsed]: Filed July 14, 1947. [90]

[Title of District Court and Cause.]

ORDER FOR TRANSMITTAL OF ORIGINAL
EXHIBITS IN LIEU OF COPIES

On motion of all the defendants above named,
and plaintiff consenting thereto, and it appearing
to the Court that due cause exists therefor, It Is
Hereby

Ordered and Adjudged that the Clerk of the
above entitled Court be, and he is, hereby directed
to include in the record on appeal of the above
matter to the Circuit Court of Appeals for the
Ninth Circuit all the originals of the exhibits ad-
mitted in evidence at the trial of the above cause,
in lieu of copies thereof.

Done in Open Court July 14th, 1947.

ROGER T. FOLEY,
District Judge.

Presented by:

C. E. HUGHES,
Attorney for all the
Defendants.

Approved and agreed to:

JOHN E. BELCHER,
Attorney for Plaintiff.

[Endorsed]: Filed July 14, 1947. [91]

[Title of District Court and Cause.]

STATEMENT OF POINTS

The points upon which the defendants and appellants, M. A. Wyman, M. A. Wyman, doing business as M. A. Wyman Lumber Company, and M. A. Wyman, M. H. Wyman and Edward Doran, doing business as the Wyman Mill Company, intend to rely on in this appeal are as follows:

1. The District Court erred in permitting any evidence, over defendants' objection, tending to establish fraud, when none was alleged.

2. The District Court erred in failing to dismiss the action because the second amended complaint served and filed after the statute of limitations had run, introduced a new and different cause of action.

3. The District Court erred in denying defendants' motion to dismiss this case at the close of plaintiff's testimony, for failure of proof.

4. The District Court erred in finding as a fact, and concluding as a matter of law that these defendants made any sales of surfaced lumber at prices in excess of the maximum prices fixed by Revised Maximum Price Regulation 26.

5. The District Court erred in finding as a fact, and concluding [92] as a matter of law that Granite Falls Planing Mill, a corporation, was used by these defendants for the purpose of securing prices in excess of the prices permitted under Revised Maximum Price Regulation 26.

6. The District Court erred in holding that Revised Maximum Price Regulation 26 fixed the prices for surfacing or planing lumber.

7. The District Court erred in holding M. A. Wyman personally liable for any dereliction of Granite Falls Planing Mill, a corporation, merely because he was an officer thereof, especially where said corporation is not a party defendant.

8. The District Court erred in failing to conclude as a matter of law that plaintiff was estopped to maintain the action, by the course of conduct of his subordinates.

9. The District Court erred in failing to conclude as a matter of law that the defendants did not violate Revised Maximum Price Regulation 26.

10. The District Court erred in holding that service on one partner is service on all the other partners.

11. The District Court erred in awarding any judgment against M. H. Wyman or Edward Doran, after they had long since been dismissed from the action by formal order of the Court.

12. The District Court erred in awarding a judgment in favor of plaintiff and against these defendants, and in failing to adjudge that the action should be dismissed.

13. The District Court erred in denying defendants' motion for a new trial.

C. E. HUGHES,

Attorney for Defendants.

Received a true copy this 16th day of July, 1947.

/s/ JOHN E. BELCHER,

Assistant U. S. Attorney.

[Endorsed]: Filed July 23, 1947. [93]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

Come now all the defendants above named, and as appellants, submit the following as their designations of record on the appeal of the above cause to the United States Circuit Court of Appeals for the Ninth Circuit:

1. Summons and complaint for injunction and treble damages, and U. S. Marshal's return thereon (1).

2. Motion to Quash Service of Summons and Complaint on Granite Falls Planing Mill, a corporation, and affidavit in support thereof (5).

3. Summons and Amended Complaint for injunction and treble damages (7), and U. S. Marshal's return thereon (14).

4. Motion to quash service of summons and amended complaint on Granite Falls Planing Mill, a corporation, and M. H. Wyman, and affidavit in support thereof (11).

5. Motion to quash service of summons and amended complaint on Edward Doran (16), and affidavit in support thereof (17).

6. Motions of all the defendants to dismiss Counts I and II of the Amended Complaint (9 and 20).

7. Order on motions of Granite Falls Planing Mill, a corporation, M. H. Wyman and Edward Doran to quash the service of summons [94] and amended complaint (39).

8. Order on defendants' motion to dismiss Counts I and II of the amended complaint (38).

9. Summons and Second Amended Complaint for injunction and treble damages, and U. S. Marshal's return thereon (40 and 43).

10. Motion to quash service of summons and second amended complaint on M. H. Wyman (45).

11. Motion of Edward Doran to quash service of summons and second amended complaint, or to dismiss (48).

12. Motion of M. A. Wyman and M. H. Wyman to dismiss Counts I and II of the second amended complaint (44).

13. Motion of Edward Doran to dismiss Counts I and II of the Second Amended Complaint (49).

14. Order for substitution (52).

15. Order on Motions of M. H. Wyman and Edward Doran to quash service of summons and second amended complaint (61).

16. Order on defendants' motions to dismiss Counts I and II of the second amended complaint (62).

17. Answer of M. A. Wyman to Second Amended Complaint (65).

18. Special appearance of Edward Doran (67).

19. Stipulation (95).

20. Findings of Fact and Conclusions of Law (101).

21. Judgment (102).

23. Order on Motion to Stay Judgment (103).

24. Amended motion and motion of Edward Doran for new trial (105 and 106).

25. Docket entry June 23, 1947, showing denial of motions for new trial (116).

26. Order denying motions for new trial (117).

27. Authorization (118).

28. Order approving withdrawal and substitution of attorneys (123). [95]

29. Withdrawal of attorneys for Edward Doran (122).

30. Substitution of attorneys for Edward Doran (124).

31. Substitution of plaintiff (126).

32. Notice of Appeal by defendants (128).

33. Order fixing supersedeas bond on appeal (129).

34. Appeal and supersedeas bond (130).

35. Order for transmittal of original exhibits in lieu of copies (132).

36. Transcript of all the evidence and proceedings at the trial of the above cause, including entire Reporter's transcript thereof (136).

37. Statement of points.

38. Designation of contents of record on appeal.

39. Clerk's Certificate.

C. E. HUGHES,

Attorney for All the
Defendants.

Received a true copy this 16th day of July, 1947.

JOHN E. BELCHER,

Asst. U. S. Attorney.

[Endorsed]: Filed July 23, 1947. [96]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK OF U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing typewritten transcript of record, consisting of pages numbered from 1 to 96, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above-entitled cause as is required by stipulation of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle, and that the foregoing, together with the reporter's transcript of testimony and proceedings transmitted as a part hereof, together with the original exhibits constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for preparing the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to wit:

Clerk's fees for making record, certificate or return:

9 pages at 40c.....	\$ 3.60
87 pages at 10c.....	8.70
(copies furnished)	
Appeal fee	5.00

Total\$17.30

I hereby certify that the above amount has been paid to me by the attorney for the appellants.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 31st day of July, 1947.

[Seal]

MILLARD P. THOMAS,
Clerk.

By /s/ TRUMAN EGGER,
Chief Deputy Clerk.

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 1279

PAUL A. PORTER, Administrator, OFFICE OF
PRICE ADMINISTRATION,

Plaintiff,

vs.

M. A. WYMAN, d/b/a M. A. WYMAN LUM-
BER COMPANY; M. A. WYMAN, M. H.
WYMAN, and EDWARD DORAN, d/b/a
THE WYMAN MILL COMPANY, and M. A.
WYMAN,

Defendants.

TRANSCRIPTION OF PROCEEDINGS
AT TRIAL

Before: The Honorable Howard C. Speakman,
District Judge.

September 26, 1946.

Appearances:

Andrew H. Hitchcock, Esq., and James W. Por-
ter, Esq., appearing for the Plaintiff;

C. E. Hughes, Esq., appearing specially for all
defendants except Edward Doran;

Raymond D. Ogden, Jr., appearing specially for
the Defendant Edward Doran.

Mr. Hughes: If the Court please, I think the
Court should have a very clear idea of what has
transpired in this case. If your Honor will permit
me five or ten minutes, I think I can cover the
salient points that I think may arise this morning.

This action was started in 1945 by the O.P.A. to recover \$61,000, I believe is the amount with which they originally started out. They made some six or eight defendants in the suit for violation of Maximum Price Regulation 539. That is a Servicing [3*] Regulation.

M. A. Wyman was the only party defendant who was served on that case in the original Complaint. I appeared for M. A. Wyman and moved to dismiss the Complaint on the ground that it didn't state facts sufficient to constitute a cause of action. The O.P.A. evidently realizing that the Complaint was faulty, did nothing on that motion for a period of four months, and in November, 1945, it served a Summons and Complaint on all of the defendants.

I then appeared specially for M. H. Wyman, who is the son of M. A. Wyman, and the Granite Falls Planing Mill, and moved the Court to quash the service on the ground that the Complaint was not served within the three months' period as provided by Rule 15, local rule of this court.

That law conforms with the rule of the State Court which requires that the Complaint must be served within ninety days after it is filed or the action will be dismissed against the defendants not served. That is substantially what that rule provides.

That matter came on for hearing before Judge Bowen, and after argument Judge Bowen granted my motion to quash the service as to M. H. Wyman and The Granite Falls Planing Mill, a corporation. Mr. [4] Ogden, who is here, appeared for Edward

*Page numbering appearing at top of page of original Reporter's Transcript.

Doran, the other defendant, and made a similar motion, and the Court granted the motions and entered an order on those motions dismissing,—the Court went further than the motion and dismissed the action as to The Granite Falls Planing Mill and M. H. Wyman and Edward Doran. So, therefore, I concluded they were out.

Then, however, the O.P.A. decided to serve a Second Amended Complaint; and they attached a Summons to the Second Amended Complaint and made the same parties defendant except Granite Falls Planing Mill. They left that corporation out in the Second Amended Complaint but served each of the defendants with another Summons and Second Amended Complaint.

The Court: Are you speaking of the Second Amended or the Amended Complaint?

Mr. Hughes: The Second Amended,—they also did that with the Amended Complaint.

The Court: All right.

Mr. Hughes: Of course, I preserved my special appearance throughout. But the Second Amended Complaint alleged—not a violation of 539, but a violation of Revised Maximum Price Regulation 26.

Now I want to state that the Regulations in the OPA are divided into two general classes. One is known [5] as a commodity regulation which regulates the price of a commodity. Such a Regulation would affect automobiles, the sale of lumber. Then we have what is known as Service Regulations which cover prices to be charged for services on certain commodities such as repairing automobiles,

a laundry, and planing lumber. That covers under Service Regulations and that is covered in this case by 539.

The O.P.A. is required to set out the considerations prompting, or the reasons or considerations for the enactment of a Regulation. In fact, when each amendment is made to a regulation,—and by the way there are hundreds and hundreds of amendments to these regulations—26 and 539. As each amendment comes out they are required to set out the Considerations of why they would make this change. Your Honor will notice a violation, of course, of 539 which is a Service Regulation and is entirely different from a violation of 26 which is a Commodity Regulation. It requires entirely different proof and your Honor can realize that I think without any argument.

Anyway, strange to say, the Plaintiff decided to keep all of these defendants in and serve them all again with a Second Amended Complaint and a summons alleging this violation of 26. That is the first time [6] that 26 has come into the picture. I appeared specially for M. A. Wyman.

I may say, by the way, that all three of the Complaints alleged that this violation occurred between July 11, 1944, and December 22, 1944—that is about a 6-months' period there. Now, the Emergency Price Control Act says that any action of this kind must be commenced within one year after the last alleged violation. The Second Amended Complaint was not filed until February 27th, 1946.

That is more than two months after the last violation; in other words, it was outlawed I maintain at the time the Second Amended Complaint was filed. Therefore, I appeared specially for M. A. Wyman and I have preserved his special appearance throughout because the action shows on its face that the Statute of Limitations expired.

I also moved on behalf of M. H. Wyman, and a similar motion was made on behalf of Edward Doran, to dismiss them from the case a second time. The matter came on for hearing and the Court dismissed them as individuals. Your Honor may have read the Order—but the Court inserted in the Order, as to the partnership the motion was denied.

Now, I don't know what the Court had in mind. I [7] can't to save my life figure out why the Court would write that in an Order after they had been dismissed on the prior complaint. So that the situation now is to my mind anomalous and I just can't understand how any judgment could possibly be entered against M. H. Wyman, and the same applies, of course, to Mr. Doran.

I don't know how Counsel proposes to show that M. A. Wyman had any connection with this. I want to state to your Honor that I confidently believe that he has changed his cause of action and therefore, if that is true, of course the statute of limitations would ipso facto, decide the whole thing right off. Besides that—and I call this to the Court's attention now, because I realize the case will be tried before your Honor without a jury but I want the

record to be clear on this question that evidence of what The Granite Falls Planing Mill may have done has nothing to do with the issues in this case; that the issue in this case is very clear. They have set out *M. A. Wyman*,—another thing; I might digress for a moment.

I thought at the time the Granite Falls Planing Mill was dismissed that that would end the suit. But he has tried to keep the same allegations into a large [8] extent. Notwithstanding the fact that the Court has dismissed these other two defendants, he still insists that the “defendants” did this. To my mind there is only one defendant in the suit in the various capacities, *M. A. Wyman* doing business as *Wyman Lumber Company*, and *M. A. Wyman’s* connection with the *Wyman Mill Company*. That is the only defendant that I can see that is in the suit now. So any evidence pertaining to the Granite Falls Planing Mill which has been dismissed from this suit I, of course, will object to.

I just wanted the Court to get a brief picture of this.

The Court: *Mr. Hughes*, did you raise this question of statute of limitations at any time?

Mr. Hughes: Oh, yes.

The Court: That was before you answered?

Mr. Hughes: I raised it in a way that it was a separate and distinct cause of action,—that the second complaint was a separate and distinct cause of action, and that the statute of limitations had run against it.

The Court: What was the Court's ruling on that?

Mr. Hughes: I don't know whether your Honor read some remarks there,—I didn't have them transcribed. The Office of Price Administration had them [9] transcribed. Your Honor read the Court's decision there. It is four or five pages,—very short.

The Court: Do you have a copy of it there?

Mr. Hughes: Yes, your Honor. The O.P.A. had it transcribed, and I think it gives the Court some idea.

The Court: How did you raise this, Mr. Hughes?

Mr. Hitchcock: By a motion to dismiss.

Mr. Hughes: By a motion to dismiss. [10]

The Court: Your original complaint had four counts.

Mr. Hitchcock: Yes. Two of those involved trucking charges. Mr. Hughes satisfied me that there was no merit in the trucking charges so those were voluntarily dismissed; they are out.

The Court: So there were two for trucking charges?

Mr. Hitchcock: That is correct.

The Court: What were the other two for?

Mr. Hitchcock: For violation of Maximum Price Regulation 539, one for injunction and one for treble damages.

The Court: When did you charge that violation in your original Complaint?

Mr. Hitchcock: I charged it between the dates of [16] July 11, 1944, and December 22, 1944—the dates of the occurrences.

The Court: In the original Complaint?

Mr. Hitchcock: Yes, sir. [17]

The Court: You claim, then, that M. A. Wyman used these companies through which he manipulated to raise these prices?

Mr. Hitchcock: That is true.

The Court: The Court can always look through the corporate veil.

Mr. Hitchcock: I wanted to place that before your Honor for your consideration of the evidence.

I do believe that I should be entitled to place that before you for your consideration. I think that is something that is necessary for the trial of this case and I think that it has been alleged sufficiently within the transactions we have set out from the beginning and also in the Second Amended Complaint.

Mr. Hughes: I think your Honor clearly sees, [31] now, that he proposes to amend his complaint again by showing fraud or evasion. I don't know where this thing will end up. But it is very clear that he says now that he proposes to show fraud or evasion. I certainly can't conceive of such evidence going in. And that is what I wanted him to state in the first place,—just what he expected to prove, which would show very clearly that this is a new cause of action that he will attempt to prove.

Your Honor asked a very pertinent question here a moment ago about the Granite Falls Planing Mill. I can tell you why he has proceeded as he has,—because the Granite Falls Planing Mill, as alleged in the first complaint, was the only one

of the defendants who did any planing. The others did no planing, performed no services.

Now, when the Granite Falls Planing Mill was dismissed, instead of him going home like a good boy and giving up, he didn't do it. He said, "I am going to proceed against M. A. Wyman."

If he had set up what he now claims he is going to try to prove,—namely fraud or evasion—the Court would have thrown him out of court just as soon as it was called to his attention. But he proposes to come in, so to speak, by the back door, and try to show [32] through a further amendment that there was fraud committed here. I think it is very clear that he has changed his cause of action.

Our Supreme Court laid down the rule on that question of change of the cause of action as early as 158 U. S. It is in the *Union Pacific Railway vs. Willer*, 156 U. S. 285.

The Court: Is that under 15 (c) ?

Mr. Hughes: 15 (c) wasn't passed then. But the court lays down a rule and it has been cited since 15 (c) has gone into effect that this is the law to-day,—that you can't change a cause of action.

Now the question is "What is a change of cause of action"—that is the only thing involved here. What amounts to a change of cause of action? [33]

The Court: All right. Now, the pleading, the Complaint, the allegations, are not for the purpose of getting the man in court and after he is in there, springing something new on him,—springing a trap on him. The function of a Complaint is to in general language be specific and notify the defendant of

what he is charged with so that he can come into Court and defend. It is not for the purpose of making one broad statement and getting him into court and then proving something on him that he never heard of or thought of before. Now, if your pleadings are specific enough to permit you to prove this, the Court will [40] permit you to prove it. There isn't any question but what your theory of the evidence is admissible if the pleadings justify it.

This thing of filing a Mother Hubbard pleading, and then coming in and proving anything that is in the mind of the plaintiff, that shall not be tolerated by the courts because that is resorting to trickery and the courts are not established for that purpose.

Mr. Hitchcock: A violation of 26, which this is.

The Court: —where you say they made numerous sales to persons at prices in excess of the maximum price. Now, that alone means that it simply went out and sold for more than the maximum price. It doesn't say that he did it by a straw man built over here or that he did it by fraud or anything of the kind. You just say that he went out and sold it. [42]

The Court: I have been going over this file and attempting to learn what has taken place in this case in the past. The reporter was kind enough to read to me the arguments on these motions of the defendants—the motion to dismiss the Second Amended Complaint and also the motion to make more definite and certain.

I noticed that the Court just denied your motion to make more definite and certain, Mr. Hughes.

Now, I want to ask you, Mr. Hughes, did you know before today that the plaintiff intended to and would offer to this court evidence as to the part that the Granite Falls Planing Mill played in this matter as they now contend; did you know about that before today? I mean by that, did you know that they would offer proof on that before today?

Mr. Hughes: Well, your Honor, I had no way of knowing positively. I have been trying to wrack my mind how he is going to prove this case; I do yet. [49] And I don't know right now how he intends to prove the case.

The Court: Have you seen this Statement of Facts or "Order of Proof" he has it titled? Have you seen that?

Mr. Hughes: I just read it, yes, your Honor. I have just read it. It was just handed to me this morning.

The Court: Well, as I understand, Mr. Hughes, that the plaintiff in this case will offer to show that the Wymans and Mr. Doran, I believe his name is, created this planing mill—the Granite Falls Planing Mill—had that corporation created and that was a dummy corporation, where they had this planing done, and that by so doing they could raise the price of lumber; and they will show that to show that they violated that part of 26 which prohibits that certain maneuvering on the part of lumbermen. Did you know before today that they would offer that?

Mr. Hughes: No, your Honor, I didn't know. As I say, I have never known just exactly how he is going to prove his case. I don't know even now how he hopes to prove it.

If I may state this: So far as the corporation is concerned, the corporation was organized in January, [50] 1944. There was no inhibition in any Regulation preventing a person owning a mill at that time from operating as they did operate later. So the corporation was organized at least three months I would say, before—at least two months before any regulation on this planing of lumber was adopted. The first regulation was Supplementary Order Number 27 to MPR-165. Now, all services were governed by 165 at all times. In April, 1944, an Order called Supplemental Order Number 27 came out—

The Court: Pardon me, Mr. Hughes. I am sorry to interrupt you. Let's don't argue that.

The thing I want to know is this: The Second Amended Complaint charges you with the sale of lumber beyond the ceiling price—in excess of the ceiling price. It doesn't say how you did it, it doesn't indicate how you did it.

Now, are you caught by surprise or are you not when they offer to prove that your clients manipulated this thing through the Granite Falls Planing Mill and thereby raised the price of lumber?

Mr. Hughes: Well, I will say this, your Honor: The last day or two I have been trying to figure out how they were going to prove it.

The Court: Did they ever tell you how they were [51] going to prove it?

Mr. Hughes: No, that was never gone into—how they were going to prove it.

The Court: I see nothing in this record that

indicates that you were informed by any of the record. You came in and asked them to make that more definite and certain. Judge Bowen denied that promptly and gave you your right of discovery—that you could pursue that. If you were caught by surprise—if you didn't know that that was to be their method of proof, this Court will not permit them to prove it. In other words, if by this overall complaint they have got you in here and you didn't know what the cause was, and if you would have filed a different Answer in this action had you known that, the Court will not permit them to do it.

Now, if you had of known that, would you have filed a different answer from that which you did file?

Mr. Hughes: Why, I think I would, your Honor. I would have to think it over, but I don't see how I could get by with the answer I filed in the case and meet such a charge. [52]

EDWARD DORAN

called as a witness on behalf of the Plaintiff, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Hitchcock:

Q. Your name is Edward Doran?

A. That is correct.

Q. You are one of the defendants in this suit?

A. I suppose.

(Testimony of Edward Doran.)

Q. What is your occupation?

A. Mill superintendent.

Q. What is your present address?

A. Darrington, Washington.

Q. What was your address at the time you were served with [61] a Summons in this case?

A. Do you mean the first Summons—or what you served on me day before yesterday?

Q. The first Summons.

A. I imagine it was Granite Falls.

Q. How long have you been connected with the lumber industry?

A. Approximately thirty-five years.

Q. How long have you known M. A. Wyman, the defendant in this suit?

A. I would say in the neighborhood of five years.

Q. With reference to from July 11, 1944, to and including December 2, 1944, did you have any business connection with M. A. Wyman at that time?

A. I was just the superintendent of the mill.

Q. Were you connected with M. A. Wyman?

A. Well, I was, yes.

Q. Do you know of your own knowledge that the M. A. Wyman named in this case as being the owner of the M. A. Wyman Lumber Company, was the owner of the M. A. Wyman Lumber Company at that time?

A. That is right.

Q. Was he also the same person who was named as copartner in the Wyman Mill Company at that time?

A. That is correct. [62]

Q. Were you a partner also in the Wyman Mill Company at that time?

A. I was.

(Testimony of Edward Doran.)

Q. You were also a superintendent?

A. That is right.

Q. What were your duties?

A. My duties were to buy the logs for the mill and supervise the operation of the Mill, and hire the men.

Q. Where was the mill located?

A. In Granite Falls, Washington.

Q. Prior to this time, how long had you been working for M. A. Wyman?

A. Prior to the first summons, do you mean?

Q. No; prior to July 11, 1944.

A. Well, I imagine approximately two and a half years.

Q. In the same capacity?

A. That is right.

Q. In the same location?

A. That is right.

Q. Were you also at that time a stockholder in the Granite Falls Planing Mill?

A. I imagine I was.

Q. Well, were you? A. Yes.

Mr. Hughes: At what time was this? [63]

Mr. Hitchcock: Between July to December, 1944.

Mr. Hughes: I am going to object to that, if the Court please—any evidence bringing in the Granite Falls Planing Mill—for the reason that the Granite Falls Planing Mill has been dismissed from this action and it has nothing to do with the issues in this case what Granite Falls Planing Mill did or

(Testimony of Edward Doran.)

its organization or its operation or anything pertaining to it because there is nothing alleged in the Complaint; there is nothing alleged in any of the pleadings to show that Granite Falls had any connection with any violation of 26. I therefore object to it.

The Court: Overruled.

Q. (By Mr. Hitchcock): Were you a stockholder in the Granite Falls Planing Mill?

A. I was.

Q. During this period referred to?

A. That is right.

Q. Did you have any other connection with that company during this period?

A. Well, I was a partner in the Mill.

Q. I mean the Granite Falls Planing Mill.

Mr. Hughes: If your Honor please, I wish it understood that my objection goes to all of this testimony pertaining to the Granite Falls Planing Mill.

The Court: It may be so understood. [65]

Q. Will you describe to the Court the exact procedure involved during this period July to December in producing say, a rough dimension plank in the Wyman Mill; just describe how that lumber was produced.

A. I could describe the manufacturing part of it. Is that what you want me to do?

Q. Yes.

A. Well, first orders came in for the Wyman Mill Company. They came in in the rough. Then

(Testimony of Edward Doran.)

we would get that order in the rough. Then we would get orders from the customer that wanted lumber to the Granite Falls Planing Mill authorizing us to go ahead and resurface and plane and saw and remark and grade and load the lumber.

The Court: Will you state that again please?

The Witness: Our orders came from the customer to the Granite Falls Planing Mill authorizing us how to remanufacture that lumber, how to surface that lumber, whether we should re-saw it or plane it, mark it, grade it, and load it on cars.

The Court: That was from the buyer you got that request?

The Witness: That is right.

The Court: What lumber would he have you plane and saw and mark and so forth?

The Witness: Well, the order would come to our [68] mill and we would have it in the rough. Then we would not put that through the planer until such time as we got orders from the customer instructing us what to do with that lumber.

The Court: You are speaking of the Granite Falls Planing Mill?

The Witness: That is right.

The Court: The order would come there?

The Witness: Yes.

The Court: You would have the rough lumber there, is that right?

The Witness: That is right.

The Court: You understand that I don't know anything about lumber. In my country the only

(Testimony of Edward Doran.)

thing that grows higher than an ordinary man's knee is a cactus, so I don't know anything about lumber. Go ahead.

Q. (By Mr. Hitchcock): Who produced this rough lumber you are speaking about; wasn't that the Wyman Mill Company?

A. Wyman Mill Company produced some of it and we bought a tremendous lot of lumber. We bought from a large number of mills throughout the war that had no planers, and we planed it and sold it on the market.

Q. But a large proportion of it during the period we are [69] talking about was produced in the Wyman Mill, is that correct?

A. I wouldn't say that, Mr. Hitchcock; not a large proportion of it. We bought a tremendous lot of lumber from small gypo mills on the outside.

Q. Did you have any supervision or anything to do with the invoicing on this?

A. Not at all, Mr. Hitchcock.

Q. Do you know of your own knowledge who handled the invoicing? A. M. H. Wyman.

Q. On both operations? A. Yes.

Q. That is on the Granite Falls Planing Mill and also on the——

A. I took my orders from M. H. Wyman on both of them.

Q. M. H. at that time was a partner in the Wyman Mill and also—do you know whether or not he owned stock in the Granite Falls Planing Mill?

(Testimony of Edward Doran.)

A. I don't think M. H. at that time had any interest in the Wyman Mill. I think it was in the planing mill, I am quite sure. I am quite sure that is the way it was. I was always under that impression but I was just hired on a salary.

Q. You don't know, though, do you?

A. No, I would say I don't know.

Q. Do you know who handled the shipment of these shipments from the Granite Falls of the surfaced lumber?

A. All of the tallies were sent to our main office, Mr. Hitchcock; all of the shipments and invoices were made from there.

The Court: Did I understand you to say that you were a partner in the Wyman Mill Company?

The Witness: I was a partner in this way: I was hired on a salary and I participated in the company. We never made any money. We took a mill over and it was in terrible shape, and we put the money back into the mill.

The Court: Was that during July to December, 1944?

The Witness: Yes, it was.

Q. (By Mr. Hitchcock): What company handled the shipments if you know?

A. Northern Pacific?

Q. Where was the shipping point?

A. Snohomish.

Mr. Hitchcock: That is all.

(Testimony of Edward Doran.)

Cross-Examination

(Letter marked Defendants' Exhibit A-1 for Identification.)

By Mr. Hughes:

Q. Mr. Doran, handing you Defendants' Exhibit A-1, is [73] that typical of the instructions you got from all of your buyers—from all of your customers who wanted the Granite Falls planing mill to plane lumber?

A. Yes. All orders coming to the Granite Falls Lumber Company came like this. That is all I know.

Mr. Hughes: I will offer Exhibit A-1 in evidence.

Mr. Hitchcock: No objection.

The Court: It may be received.

(Defendants' Exhibit A-1 received in evidence.)

(Testimony of Edward Doran.)

DEFENDANS' EXHIBIT A-1

Letterhead of Central Lumber Sales Company

November 7, 1944

Granite Falls Planing Mill, Inc.

Box 237

Granite Falls, Washington

Gentlemen:

The M. A. Wyman Lumber Company will deliver to you shortly for our account, a car of Rough Green Fir and Hemlock, which we wish to be handled as follows:

1. All 2" and 4" stock to be S4S.
2. 3x12's to be left rough.
3. Send invoice to us for your services, which will be ceiling per MPR 539, for milling, grading, tallying, loading, etc. Your invoice to be paid upon receipt of same and is not subject to cash discount. (Represents labor only).
3. Ship car to C. L. Geer Lumber and Coal Company, Diller, Nebraska. Route via CB&Q.
4. Show M. A. Wyman Lumber Company as shippers and send B/L to them. Load in box car.

Very truly yours,

CENTRAL LUMBER SALES
COMPANY,

T. M. PIMLOTT.

TMP:jp

cc:MAW

Admitted Sept. 26, 1946.

Mr. Hughes: That is all.

(Witness excused.)

Mr. Porter: I would like to call Mr. Johnstone.

Mr. Hughes: Mr. Hitchcock—if your Honor has ruled that this evidence is admissible, as far as the Granite Falls Planing Mill, and if your Honor is going to permit the Plaintiff to show facts outside—what I consider outside of the issues in this case—I want to save all of the time that is possible, not only of the Court but of the witnesses, too. I am willing at this time to stipulate some facts, in order to save time, with the understanding that I am objecting [74] to that part of the testimony.

The Court: Mr. Hughes, the Court really hasn't ruled on anything. We did a lot of talking here and I told the Plaintiff to proceed. I take it that you have the right to make any objection to any of this evidence that you see fit and the Court does not mean to say that the Court will admit all that they propose.

You have a right to make any record you see fit and maybe the Court will agree with you on some of it. I didn't mean by that to preclude you from making any record of any objection that you see fit.

Mr. Hitchcock: We have a stipulation prepared, if the Court please, which embodies that fact. It will save a great deal of time. This question, for example, of the formation of the corporation of which I have certified copies we will have to introduce and things of that type.

The Court: You will stipulate to that?

Mr. Hughes: I will stipulate to any fact, your Honor. I don't want to delay this or put the plain-

tiff to any unnecessary work but, as I told him, I felt that this evidence was entirely inadmissible. However, if the Court permitted it to go in, I didn't want to delay the trial and wanted the Court to understand that [75] I am stipulating with the understanding that we object to the admissibility of it upon the grounds that I have stated that it is not within the issues; that he has changed his cause of action and now seeks to lay the foundation at least for fraud or deceit or evasion—I don't care what you call it—and that by doing so he has entirely changed the cause of action.

My objection, of course, goes to that line of testimony.

Mr. Ogden: If your Honor please, for the purpose of the record I would like to have the record show that the same objections that Mr. Hughes has made for Mr. Wyman also run for Mr. Doran, and in that way it won't be necessary to make two objections to each ruling.

The Court: Very well. The record may show that each objection made by Mr. Hughes on behalf of M. H. Wyman is also made by Mr. Ogden on behalf of Edward Doran. The record may show the same ruling.

Mr. Hughes, I may further make myself clear. Remember, Judge Bowen said to you that he would reconsider this matter when the evidence was in. I am trying to follow the procedure that he laid out. So I might say that I will exercise that same right. So just because the evidence goes in doesn't mean that [76] they are successful in the matter.

Mr. Hitchcock: We understand that, if your Honor please.

The Court: Mr. Hughes, I understand that you contend that no evidence pertaining to the Granite Falls Milling Company is admissible.

Mr. Hughes: That is right, your Honor.

The Court: You object to it?

Mr. Hughes: I object to it and I object to any evidence that tends or seeks to hold M. H. Wyman—and I presume the same applies to Mr. Doran—because they were dismissed from this case.

The Court: And that by this stipulation you do not waive that right?

Mr. Hughes: That is right.

The Court: I see; all right.

Mr. Hitchcock: I will call Mr. Rothfield.

JOSEPH ROTHFIELD,

a witness called on behalf of Plaintiff, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Hitchcock:

Q. State your name.

A. Joseph Rothfield.

Q. What is your address?

A. 13749 8th Avenue Southwest, Seattle 66, Washington.

Q. What is your occupation, Mr. Rothfield?

(Testimony of Joseph Rothfield.)

A. Investigator and Commodity Supervisor, Field Station, Seattle, for the Regional Lumber Enforcement Unit.

Q. How long have you been so employed?

A. Since March, 1945.

Q. What are your duties?

A. To investigate lumber cases.

Q. How long have you been connected with the lumber industry?

A. Over seventeen years. [78]

Q. In the course of your duties, have you had occasion to examine any transactions relative to the defendants or any of them?

A. I have.

Q. Do you know M. A. Wyman?

A. I do.

Q. That is through your investigations?

A. Through the investigation, yes.

Q. Do you know of your knowledge that the M. A. Wyman named as M. A. Wyman Lumber Company is the same person and the M. A. Wyman named as M. A. Wyman in the Wyman Mill Company?

A. I do.

Mr. Hughes: We admit that.

Mr. Hitchcock: I believe that is all admitted. I can dispense with that.

Q. (By Mr. Hitchcock): Mr. Rothfield, are you generally familiar with the Revised Maximum Price Regulation 26?

A. I am.

Q. What species of lumber does this regulation cover?

(Testimony of Joseph Rothfield.)

A. Douglas fir and other West Coast products.

Q. Was this regulation in force between July and December, 1944? [79] A. It was.

Q. Do you know whether or not it establishes maximum prices for surfacing lumber?

A. It does.

Q. Do you know what the surfacing charges under this regulation are for the type of lumber involved in this case? A. I do.

Q. What are those surfacing charges per thousand feet board measure?

Mr. Hughes: Just a minute. This is not an action, if the Court please, for surfacing lumber. This is an action under 26 to recover the price overcharge on the sale of lumber—not servicing of the lumber. I don't see the materiality of the witness stating the charges for servicing lumber. I think we are complicating the issues in this case. The only issue in this case is whether or not M. A. Wyman has charged over ceiling prices fixed by RMPR 26. Now, the regulations for surfacing lumber is covered by 539. I don't see the materiality and I object to it.

Mr. Hitchcock: If the Court please, I think the witness has testified that he knew that the prices for surfacing lumber were covered by RMPR 26. [80] If the Court wishes more elaboration, I might have the witness explain how that is done.

The Court: How what is done?

(Testimony of Joseph Rothfield.)

Mr. Hitchcock: How the charges are computed under 26 for surfacing lumber.

I can do that a little later on.

Mr. Hughes: I would like to do that because I am all wrong if 26 fixes any prices for surfacing lumber or servicing lumber. It is purely a commodity regulation, regulating the price at which the commodity shall be sold—either the rough green or the finished; but at no place does it fix the price for servicing.

The Court: It will probably be enlightening to both Mr. Hughes and myself.

Q. (By Mr. Hitchcock): Mr. Rothfield, will you explain to the Court in detail just how the price for surfacing lumber is computed under the provisions of RMPR 26?

Mr. Hughes: I object to the form of that question. I would like to ask the witness on a preliminary examination here to determine concerning 26.

Q. (By Mr. Hughes): You refer to Table 2 of 26, do you not, as fixing the price? [81]

A. For dimension lumber, yes.

Q. And you say under Table 2 of RMPR 26, it fixes the price for surfacing lumber?

A. That is right. And if the lumber is shipped in the rough, at the end of the table it says "deduct $1\frac{1}{2}$."

Q. Show me in 26 where it fixes the price for surfacing lumber.

A. Table 2. It says, "Dimension Number 1 green, S-4-S American Lumber Standards."

(Testimony of Joseph Rothfield.)

The Court: What does that mean "S-4-S"?

The Witness: That means surfaced four sides, your Honor.

"And if the lumber is shipped in the rough form deduct for rough \$1.50." In other words, if a piece of 2 by 4 10-foot is shipped S-4-S, which means surfaced four sides, the price is \$33.00. As an example, if it is shipped in the rough form, it is \$31.50.

Q. (By Mr. Hughes): In other words, that fixes a price for the sale of surfaced lumber and also the price for the sale of rough lumber?

A. That is right.

Q. But it nowhere in there fixes the price for surfacing lumber, does it? Now answer that question. [82]

A. Table 2 gives the price for lumber shipped, and in the industry it has been recognized all through the years—

Q. I am not asking you that. Just answer the question, will you please?

A. Let me answer my question. All lumber dealers all through the period of the Office of Price Administration—if they have shipped it rough they have used the rough price; if they shipped it S-4-S they used the S-4-S price. That is the difference provided in the price.

Q. But it doesn't fix the price for surfacing lumber, does it—26? A. It certainly does.

Q. (By Mr. Hitchcock): Would you say that the difference between the two is the addition permitted under the regulation for surfacing?

A. That is right.

(Testimony of Joseph Rothfield.)

Mr. Hughes: What was the difference?

Mr. Hitchcock: The difference between the rough price and the S-4-S price is the addition.

Mr. Hughes: 26 is purely a commodity regulation. It fixes no price for surfacing. Nowhere in 26 does it fix the price for servicing lumber. It fixes the [83] price for green lumber. It fixes the price for lumber after it has been surfaced—that is all. It doesn't attempt——

The Witness: It fixes the price even for dry lumber, if you look further down.

Q. (By Mr. Hughes): 539 covers the price for servicing lumber, doesn't it—for planing lumber?

A. 539 is a custom milling regulation.

Q. Servicing regulation, isn't it?

A. No. It is a custom milling regulation covering the phases of the re-manufacture of lumber.

Q. Is it a commodity regulation?

A. It is a custom milling regulation.

Q. Answer the question. Is it a commodity regulation or servicing regulation?

A. It is known to me as a custom milling regulation. That is all I can answer.

Q. You won't answer that question?

A. I cannot answer it anyway because that is the way the regulation reads.

Q. You are familiar with the regulation aren't you?

Mr. Hitchcock: If the Court please, I would like to have a ruling on the admissibility of this evi-

(Testimony of Joseph Rothfield.)

dence and then I would like to complete my examination, [84] and if Mr. Hughes then wants to cross-examine, it might be proper.

Mr. Hughes: I wanted to determine the accuracy of the statement, that is all. With the preliminary I am through right now.

The Court: Go ahead.

Mr. Hitchcock: Thank you, sir.

Q. (By Mr. Hitchcock): Are you familiar with Sections 1 and 16 of Revised Maximum Price Regulation 26? A. I am.

Q. Just generally what do those provisions hold?

Mr. Hughes: Just a minute. I think the Court can read that and understand it as well as anybody else.

The Court: You may explain any of those tables but—the interpretation, the plain language, the Court will do that.

Q. (By Mr. Hitchcock): What period of time was covered by your investigation in this case?

A. July 11, 1944, to December 22, 1944.

Q. With reference to the sales involved, do you know whether or not these were the same sales in each case—— [85] A. Yes.

Mr. Hughes: Just a moment. I want to ask a question.

Q. (By Mr. Hughes): Were you ever in Mr. Wyman's office? A. No.

Q. The Wyman Lumber Company's office?

A. No, sir.

Q. Or the Granite Falls Planing Mill's office?

A. No.

(Testimony of Joseph Rothfield.)

Q. What investigation had you made of their operations?

A. Of the records of M. A. Wyman, doing business as M. A. Wyman Lumber Company and the Wyman Mill.

Q. Where did you get those records?

A. From the office of M. A. Wyman.

Q. Did you get the records from the office of M. A. Wyman?

A. I did not personally get the record of M. A. Wyman, but they were brought to our office.

Q. All you know is what those records show?

A. That is right.

Mr. Hitchcock: That amount is stipulated, if the Court please, in the procedure.

Mr. Hughes: I think, your Honor, I will ask to strike all of his testimony because all of his testimony is based upon what he has read of records that the O.P.A. Office has produced for him to read. He doesn't know anything about it. He hasn't investigated it and I move now to strike his entire testimony.

The Court: How did your agency get these records?

Mr. Hitchcock: Those records, if the Court please, were obtained from the office of the M. A. Wyman Lumber Company. We gave our receipt for them. We had them photostated. An investigator at that, who was in our unit and who is no longer there, and who I understand has since become ill and could not attend, was the person who

(Testimony of Joseph Rothfield.)

returned them. This witness is familiar with the regulation involved, and has checked the photostatic copies with the computations which were made in the office at the same time he was employed there.

The Court: Were they given to you voluntarily or given to you by an order of Court?

Mr. Hitchcock: They were given to us voluntarily. However, in the stipulation which I signed myself, the Defendant preserved his Constitutional rights of immunity with reference to those records. However, as your Honor knows, those records are required to be kept by the regulation and we therefore took the [87] position they were quasi public documents and we were entitled to examine them.

The Court: All right. Go ahead. Mr. Hughes' motion is denied. Go ahead.

Q. (By Mr. Hitchcock): Have you computed the correct ceiling prices under RMPR 26 for surfacing the footage of rough lumber involved in these transactions? A. Yes.

Q. Do you know that figure?

A. The total footage is 3,122,732 feet board measure.

Q. What would be the ceiling price for surfacing?

Mr. Hughes: Just a moment. That is a conclusion, I think, your Honor—what would be the correct price for surfacing?

Mr. Hitchcock: Under 26, I said. He is familiar with 26.

(Testimony of Joseph Rothfield.)

Mr. Hughes: Is he asking for servicing? This is not for surfacing—this is for selling lumber, rough lumber. All that Wyman sold was rough green lumber. That is all he sold in the world.

The Court: You are asking in the price for surfacing?

Mr. Hitchcock: The correct amount for surfacing. It is stipulated to, if the Court please. If the [88] Court feels it is acceptable, we can use the stipulation.

The Court: Overruled. Answer that question.

A. \$3826.25. That is the differentiation in the price between surfaced-four-sides lumber and rough lumber.

The Court: As shown by what?

The Witness: As shown by the tables under which each item is priced.

Mr. Hughes: What was the amount?

The Witness: \$3826.25.

Mr. Hughes: That represents what?

The Witness: The surfacing price of the lumber.

Mr. Hughes: The surfacing price of the lumber?

The Witness: The surfacing price of the lumber; the differentiation between the green, the rough, and the surfaced product.

Mr. Hughes: This \$3,826 represents the difference between what?

The Witness: If I may put it in an example, a 2 by 10 surfaced rough and a 2 by 10 surfaced four sides.

(Testimony of Joseph Rothfield.)

Mr. Hughes: That doesn't answer my question. You figured out here \$3,826.25. What does that [89] figure represent?

The Witness: That is the difference between shipping the lumber in the rough and shipping the lumber in the surfaced.

Mr. Hughes: How do you arrive at that figure?

The Witness: Through the tables; I figured the invoices.

Q. (By Mr. Hitchcock): Mr. Rothfield, from your study of the records of the defendants, did you ascertain the amount that was charged for surfacing as shown by the invoice of the Granite Falls Planing Mill?

Mr. Hughes: Just a moment——

A. Yes.

Mr. Hughes: The Granite Falls is not a defendant in this case. I think we are getting quite far afield unless I misunderstand what Counsel is going to try to prove in this case. I am up a tree, so to speak. I just don't know what he is trying to get at and how he is going to get at it. Under the issues in this case I think it is impossible and I can't understand how the figures obtained from Granite Falls Planing Mill are going to help the Court solve this question, the issue of which is before [90] the Court. I object to it.

The Court: What is the purpose of it?

Mr. Hitchcock: The purpose is to show that these transactions, which he has already testified to, were the same transactions involving the same

(Testimony of Joseph Rothfield.)

footage. Mr. Doran, if you remember his evidence, testified that the invoices were made up in the same office which was the office of the M. A. Wyman Lumber Company and showed overcharges in the amount of approximately \$19,000 above the amount that could be charged under the regulation. We are speaking, if the Court please, of the identical same lumber Mr. Rothfield has just testified to.

Mr. Hughes: The question was "Did the Defendants do this" and I don't know what he means by the "defendants." The Granite Falls is not a defendant.

The Court: No, they are not a defendant.

Mr. Hitchcock: I might rephrase my question, if the Court please. I might say "the defendants."

Mr. Hughes: Who do you mean by "defendants"?

Mr. Hitchcock: Will you wait until I finish my question and then you can object to it. Pardon me, your Honor.

Q. (By Mr. Hitchcock): Mr. Rothfield, did you make any [91] computation respecting the exact amount charged by the defendants with reference to surfacing charges; did you make that—

Mr. Hughes: I object to the form of the question, if the Court please, because the word "defendants" is so misleading that the record will not show—and M. A. Wyman is the only defendant in this. There is no reason why he can't say "M. A. Wyman." But instead of that he tries to bring in a blanket question covering all of the defendants.

(Testimony of Joseph Rothfield.)

It doesn't seem that a question like that is quite fair. He should state specifically what he is trying to prove. I don't know whether it is somebody who has been dismissed from this case or whether it is somebody else.

The Court: Who do you mean?

Mr. Hitchcock: That was a preliminary question. I meant the invoices made up in the offices of the M. A. Wyman Lumber Company and sent out by the Granite Falls Planing Mill which at that time was headed by Wyman, and the superintendent was Ed Doran who was also at the same time the superintendent of the Wyman Mill Company.

The Court: When you say "defendants" who do you mean?

Mr. Hitchcock: I meant M. A. Wyman through the [92] use of the Granite Falls Planing Mill.

Q. (By Mr. Hitchcock): Will you state if Mr. M. A. Wyman, defendant in this case, who at that time was superintendent of the Granite Falls Planing Mill, made any charges for the surfacing of this lumber that you have heretofore testified?

A. Yes.

Mr. Hughes: I object to it because he hasn't testified that he knows M. A. Wyman. He is trying to state now that M. A. Wyman did this for the Granite Falls Planing Mill. How can he state that unless he knows it?

The Court: Well, that is for cross-examination. You can ask him that. Go ahead.

(Testimony of Joseph Rothfield.)

Q. (By Mr. Hitchcock): Did you make such?

A. I did.

Q. What was that about? A. \$22,955.44.

The Court: And that represents what?

The Witness: The surfacing.

The Court: The surfacing of what?

The Witness: The lumber.

The Court: What lumber? [93]

The Witness: The lumber of M. A. Wyman.

The Court: Is that the lumber that is mentioned in this complaint?

The Witness: That is right.

Q. (By Mr. Hughes): You say the lumber of M. A. Wyman? A. That is right.

The Court: Go ahead.

Q. (By Mr. Hitchcock): Have you had occasion to subtract these figures? A. Yes.

Q. What is that amount?

A. Do you mean the difference?

Q. Yes. A. \$19,129.09.

The Court: That represents what?

The Witness: The over-the-ceiling charge.

The Court: You say that represents the over-charge?

The Witness: Yes.

The Court: Now, what do you mean by "over-charge?"

The Witness: The difference in the price of the rough lumber and the surfaced lumber under Table 26. [94] The rough lumber is billed correctly \$89,427.38; and the identical lumber for surfacing

(Testimony of Joseph Rothfield.)

S-4-S is billed \$22,955.44; whereas under Table 26 the surfacing of that same lumber is \$3826.35; so therefore you deduct the \$3826.35 from the \$22,955.44. You have an overcharge of \$19,129.09.

The Court: How is that an overcharge; wherein is it an overcharge?

The Witness: Well, as I best can explain it, as I said taking as an example a 2 by 4 ten rough; under the Table 2 of RMPR 26, the price is thirty fifty. Under the price of a 2 by 4 ten S-4-S, the price is \$33.00—what did I mention before—the \$1.50 differentiation anyhow; that is the difference. The surfacing charge, as it is set up in these invoices, are two separate bills. One is for the rough lumber; one is for the surfacing. On the bill—on the invoice covering the surfacing, there is a pencil mark directing someone——

Mr. Hughes: Just——

The Witness: May I continue or not?

Mr. Hitchcock: The Judge will tell you.

The Court: Go ahead.

The Witness: There is a pencil mark on the rough invoice—there are two billings—stating to bill for surfacing so much money per thousand; then they have made that invoice. There are two identical invoices. For instance, if there was one carload shipped in M. K. T. thirty thousand feet of rough lumber; there is another invoice covering the same carload, thirty thousand feet at so much per thousand surfacing four sides. And there is one bill of lading for the same car, all three together matched, on the same day.

(Testimony of Joseph Rothfield.)

The Court: This lumber that is in question on this action?

The Witness: Yes.

The Court: How was that sold, surfaced or rough?

The Witness: Surfaced.

The Court: Is surfaced lumber permitted to be sold at a higher price than rough?

The Witness: That is right.

The Court: All right. Now again I ask you—pardon me, I don't quite understand you. Again I ask you: Wherein was the overcharge?

The Witness: The overcharge was in the computation as performed by M. A. Wyman.

The Court: How do you mean?

The Witness: The billing—their invoices. [96] I might make it clearer this way, Judge, for you: A 2 by 4 ten S-4-S, is \$33.00. A 2 by 4 ten rough is \$31.50. They billed 2 by 4 ten \$30.00 on one invoice rough; they billed another invoice bearing the same car number with the same footage at \$38.00—no, pardon me; \$8.00 for surfacing four sides.

The Court: Do you mean to say that the overcharge was in that they charged too much for the surfacing?

The Witness: They charged too much for the 2 by 4 ten, in the form in which they sold it, surfaced four sides.

The Court: Then they simply overcharged for surfaced lumber, is that correct?

(Testimony of Joseph Rothfield.)

The Witness: That is correct.

The Court: Then it was not an overcharge for the surfacing, is that right?

The Witness: Will you state your question again, your Honor?

The Court: As I understand, this lumber was sold surfaced.

The Witness: That is right.

The Court: Now, you say there was an overcharge?

The Witness: That is right.

The Court: Did that overcharge consist of just merely selling this surfaced lumber in excess of the ceiling price or did the overcharge consist in the charging of too much for the surfacing?

The Witness: In charging too much for the selling of the lumber.

The Court: Surfaced lumber.

The Witness: Surfaced lumber. The bill of lading calls that they ship surfaced lumber.

The Court: Well, was it surfaced lumber?

The Witness: The bill of lading states it was; the invoice states it was by the method of their invoicing. They show two invoices. They show the same invoice for rough and they show the same invoice for surfaced.

Mr. Hitchcock: May I ask a question at this point?

Q. (By Mr. Hitchcock): One invoice, Mr. Rothfield, covered the rough lumber, did it not?

A. That is right.

(Testimony of Joseph Rothfield.)

Q. Was that invoiced at approximately the ceiling price? A. That is right.

Q. With reference to the other invoice showing the surfacing, was that at or above the ceiling price? A. Above the ceiling price. [98]

The Court: Well, the surfaced lumber and the rough lumber doesn't sell at the same price, does it?

The Witness: No, sir. There is a differentiation in price between rough and surfaced.

The Court: Sure. So you say—as I understand you—you say that the day after they surfaced this lumber they sold it at a price in excess of the ceiling price for surfaced lumber?

The Witness: That is right; yes, sir.

The Court: All right.

Q. (By Mr. Hitchcock): Are you familiar, Mr. Rothfield, with the pricing provisions of MPR-539?

A. I am.

Q. Was that Regulation in effect at the time these transactions took place? A. It was.

Q. Will you state to the Court whether or not, from your examination of the defendants' records that Regulation had been used or attempted to be used for pricing? A. That is right.

Mr. Hughes: Had been used by whom?

Mr. Hitchcock: By the defendant, M. A. Wyman? [99]

Mr. Hughes: The witness has said a lot of things. He says he never has seen Wyman or talked to him. He might just as well answer that.

(Testimony of Joseph Rothfield.)

Mr. Hitchcock: We are getting into that point, Mr. Hughes. If you will let me proceed.

Q. (By Mr. Hitchcock): Will you explain your last statement just generally, Mr. Rothfield, please? A. What statement was that?

Q. Your last testimony relative to the charges attempted to be made under 539 by the defendant M. A. Wyman; just how is that done?

A. Well, the invoice for the rough lumber was pencil marked, which equals the amount of the surfacing invoice; in other words, a 2 by 4 column—they put down the price of \$8.00; if there was 3800 feet of 2 by 4, the other invoice had 3800 feet of 2 by 4 surfacing four sides at \$8.00 per thousand, covering the same shipment.

Q. Was that Regulation 539 applicable to the sales in this case? A. It was not.

Q. Why?

A. Because 539 covers custom milling; and the custom milling regulation calls for—that there shall be no [100] financial interest when the lumber is remanufactured, regardless of its being surfaced or cut in any form whatever.

Mr. Hughes: Just a moment, if the Court please. They are changing this thing a little further.

Mr. Hitchcock: I don't believe so.

Mr. Hughes: Besides, I am satisfied the witness will admit that this is all based on hearsay.

The Court: Make your objection.

Mr. Hughes: I object to the witness—I think it is clearly shown by the witness that most of his

(Testimony of Joseph Rothfield.)

testimony is based on what someone told him. He has never seen Mr. Wyman nor talked to anybody in the office. He doesn't know. Yet he purports to sit up here and talk very glibly about what M. A. Wyman did—that M. A. Wyman did this and that. There is nothing to show he ever talked to anyone. I therefore object to it. I think it ought to be stopped now because the witness has never seen those people and he is incompetent to testify. The whole testimony is simply hearsay.

Mr. Hitchcock: He has examined the records from which he is testifying.

The Court: He has talked about what the records show. I assume that you will show him those records [101] some time and show him that those are the records.

Mr. Hitchcock: Yes.

The Court: It is now after 4:00 o'clock. I believe in keeping strict hours, so we will take a recess until tomorrow morning at 10:00 o'clock.

(At 4:10 p.m., Thursday, September 26, 1946, proceedings recessed until 10:00 a.m., September 27, 1946, in the United States Court House.) [102]

Seattle, Washington
September 27, 1946, 10:00 A.M.

(All parties present as before.)

The Court: You may proceed.

JOSEPH ROTHFIELD

resumed.

Direct Examination

(Continuing)

The Court: May I ask this witness a few questions before you proceed?

Mr. Hitchcock: Yes, sir.

The Court: As I understand your testimony yesterday, this lumber sold by these defendants was all planed lumber.

The Witness: That is right.

The Court: As I understood from you yesterday, you checked their order.

The Witness: That is right.

The Court: And found that they had exceeded the maximum price as indicated by Table 2, did you say, of this—— [103]

The Witness: RMPR 26.

The Court: ——RMPR 26.

The Witness: That is right; that governs the products sold.

The Court: Is that the portion of this Regulation that you say covers it?

The Witness: Yes.

(Testimony of Joseph Rothfield.)

The Court: Will you take this copy of RMPR 26 and mark on Table 2 the portion of it that you say they have violated?

(Witness marks on document as requested.)

The Court: Will you read the part that you have marked for the purpose of the record?

The Witness: They have violated Table 2, Dimension number 1, green, S-4-S.

The Court: Green, S-4-S?

The Witness: Surfaced four sides.

The Court: Is there any other portion of that Regulation that you find they have violated?

The Witness: No.

The Court: All right, as I understand, you reached that conclusion after having examined their records?

The Witness: That is right. [104]

The Court: Do you have their records here?

Mr. Hitchcock: Yes.

The Court: Will you please refer to their records and use any part or all of them that you care to and show me from their records where they violated that?

I take it, Mr. Hughes, that from your stipulation here that you have no objection.

Mr. Hughes: That is right; no objection.

(Wyman invoices marked Plaintiff's Exhibit 1 for identification.)

(Wyman surfacing invoices marked Plaintiff's Exhibit 2 for identification.)

(Testimony of Joseph Rothfield.)

(Certified copy Articles of Incorporation marked Plaintiff's Exhibit 3 for identification.)

(Report allotment of shares marked Plaintiff's Exhibit 4 for identification.)

Mr. Hitchcock: 3 and 4 we won't introduce at this time.

Mr. Hughes: I don't have any objection to 1 and 2. This other, we will admit that this is a corporation. [105]

Mr. Hitchcock: It is stipulated that it is a corporation. It is also a question of who was the person who was president.

Mr. Hughes: We will admit Mr. M. H. Wyman was president during the year 1944.

Mr. Hitchcock: And also that he held the stock?

Mr. Hughes: He held 50 per cent of the stock.

Mr. Hitchcock: The authorized amount of stock being 200 shares, is that correct?

Mr. Hughes: Yes. That is, this is over my objection.

Mr. Hitchcock: That is your blanket objection, —that is all right.

The Court: This is over the objection of Mr. Hughes after the ruling, then Mr. Hughes makes these admissions. All right.

Mr. Hitchcock: Will you stipulate, also, subject to the same objection, that Edward Doran was the holder of 60 shares and that M. H. Wyman was the holder of 60 shares?

Mr. Ogden: Yes.

Mr. Hughes: Yes, that is correct.

(Testimony of Joseph Rothfield.)

The Court: Mr. Witness, will you take those records, any or all of them that you care to, and show wherein and how these defendants violated that portion of the Regulation that you say they did?

Mr. Hitchcock: If the Court please, there is also a recapitulation which has been prepared in this case in also the same order which he might wish to refresh his recollection from to present the matter a little more clearly to the Court. I would like to have your permission to show Mr. Rothfield also this.

Mr. Hughes: I am opposed to encumbering the record unnecessarily. I don't think we have reached the stage where we can go into the figures.

Mr. Hitchcock: We have reached the stage where we are going into the figures.

The Court: Well, I think the witness can do it from these exhibits before him.

Mr. Hitchcock: Yes, I think he can.

The Court: Take your time, now.

Mr. Hughes: Mr. Hitchcock, all that you have here are invoices.

Mr. Hitchcock: That is correct.

(Wyman bills of lading (copies) marked Plaintiff's Exhibit 5 for identification.)

Mr. Hughes: You have withdrawn Exhibits 3 and 4?

Mr. Hitchcock: That is right—pursuant to the stipulation.

(Testimony of Joseph Rothfield.)

(Plaintiff's Exhibit 3 withdrawn.)

(Plaintiff's Exhibit 4 withdrawn.)

Cross-Examination

Q. (By Mr. Hughes): You work under Mr. Hitchcock, don't you? A. I do.

Q. And you helped him prepare this case for trial? A. I got all of the facts together.

Q. Were you ever in the lumber business?

A. I was.

Q. You say you got all the facts?

A. I assembled facts as any investigator assembles facts.

Q. Who obtained the so-called facts?

A. The Office of Price Administration.

Q. You have read the reports of these investigators? A. I have.

Q. Do you know anything more than what is shown by those reports? [132]

A. I know what is shown by the records as presented here.

Q. And that is all you know?

A. And the reports.

Q. Just what is shown by the records here.

A. And the files.

Q. And your testimony is based entirely upon what those invoices show?

A. The overcharges are based upon what these invoices show.

Q. Yes; your claim for overcharges. Outside of those invoices, you know nothing about the charges made by the Granite Falls Planing Mill or M. A. Wyman Lumber Company?

(Testimony of Joseph Rothfield.)

A. Will you repeat that question.

(The last question was read by the reporter.)

A. These are the charges made and the invoices shown covering——

Q. Just answer my question, please.

A. I have answered it. These are the charges made by M. A. Wyman covering these shipments.

Q. I say: Do you know anything other than what is shown by those invoices? [133]

A. As to what?

Q. As to the facts pertaining to those invoices.

A. As to the overcharges?

Q. I say: Do you know anything outside of those invoices pertaining to this case? I will put it that way. It shouldn't take you long to answer that.

A. Will you please repeat that question again?

Q. What do you know outside of these invoices that have just been shown you as Plaintiff's Exhibits 1 and 2?

Mr. Hitchcock: I object to that, if the Court please. I believe it is a little too general even for cross-examination. Let him specify what facts.

Mr. Hughes: I am just trying to find out what this witness knows about the facts—if he knows anything outside of those invoices, I would like him to so state.

The Court: You may answer the question. Do you understand it?

The Witness: I don't understand his question.

The Court: He doesn't understand it.

(Testimony of Joseph Rothfield.)

Q. (By Mr. Hughes): You have examined these invoices, Plaintiff's Exhibits 1 and 2, haven't you? A. I have.

Q. Do you know anything about this case outside of what is [134] shown by those invoices?

A. These invoices——

Q. Just answer my question. Do you—yes, or no. A. Yes.

Q. Well, what do you know?

A. Well, if you will ask me a specific question, I will try to answer it.

Q. You just state what you know of your own knowledge outside of these invoices; do you know anything outside of the invoices—of your own knowledge? A. I do.

Q. Well, just state what you know to be a fact? Let us hear it; let us have it.

A. I do know the fact that these invoices should have been billed in one invoice instead of two invoices.

Q. I am not asking you that, I am asking you what facts you know outside of what is shown by these invoices? Just answer the question; what do you know?

A. That these shipments were not custom milling shipments. They were not milling in transit shipments.

Q. You claim that is shown by the invoices?

A. That is right.

Q. Well, do you know anything else?

(Testimony of Joseph Rothfield.)

A. If you will ask me specific questions, I will try to give you specific answers. I have told you that [135] these invoices are the ones that created the overcharge.

Q. You have never talked to anyone connected with the M. A. Wyman Lumber Company, have you? A. Except through you.

Q. Except me. I am the only one that you have talked to? A. That is right.

Q. You have never contacted either the office of Wyman Lumber Company, the Wyman Mill Company, or the Granite Falls Planing Mill?

A. Not personally. I have been to the Granite Falls plant there.

Q. Yes. You said you were up there. But that was lately, is that correct?

A. That is correct.

Q. Do you know anything outside of what is shown by those invoices? Now, you ought to be able to answer that.

The Court: If you can't answer the question, say so.

A. I can't answer the question.

Q. (By Mr. Hughes): You say you were in the lumber business prior to going with the OPA?

A. Not directly before going; but I have been in the lumber business for seventeen years.

Q. Where were you in the lumber business?

A. In the city of Chicago.

Q. What kind of work did you do?

(Testimony of Joseph Rothfield.)

A. I did buying and selling. I have done every phase of the distribution of lumber.

Q. Do you mean buying and selling for yourself? A. Not in the producing end.

Q. For yourself?

A. For myself and others.

Q. You were in the lumber business before?

A. Yes.

Q. And then you went with the OPA?

A. I did not come from the lumber business to the OPA. I came from the insurance business and went with the OPA.

Q. You quit the lumber business and went into the insurance business, and then finally came with the OPA?

A. That is right; I went with the Office of Price Administration.

Q. You say you are familiar with these lumber regulations, 26 and 539? A. I am. [137]

Q. I suppose that you have studied them specially for this case, RMPR 26 and 539?

A. I try to keep myself informed for every case.

Q. RMPR 26 fixes the price of lumber, doesn't it? A. It does.

Q. And 539 fixes the price for services performed on lumber, is that correct?

A. Under certain conditions.

Q. Under certain conditions?

A. That is right.

Q. But the purpose of 539 is to fix the price for servicing—planing lumber, we will say?

(Testimony of Joseph Rothfield.)

A. I think I should be asked to be relieved of that question because I think that could be best answered by the Department of the Office that can fully explain the use of 539.

Q. Now, 26 doesn't cover the price for servicing, does it? A. It certainly does.

Q. Again I ask you—I want you to tell the Court the price [141] for servicing lumber. You have RMPR 26, Table 2 before you?

A. Yes, sir.

Q. Show me where it fixes the price of servicing lumber.

Mr. Hitchcock: Servicing or surfacing?

Mr. Hughes: Servicing or surfacing; planing lumber, put it that way.

A. If the lumber leaves the plant surfaced four sides this is the price that is charged.

Q. (By Mr. Hughes): That is for the sale of lumber? A. For the sale of lumber.

Q. If it is sold without being planed, it has one price and if it is sold after it is planed, it has another price, is that correct?

A. That is right.

Q. But there is nothing in 26 that fixes the price for servicing lumber, is that correct?

Mr. Hitchcock: I object to that at this point. This witness has already testified it was not correct. Even though this is cross-examination, I would like Mr. Rothfield to do a little of the testifying. I believe that that question was too leading; in fact, it was practically your own answer.

(Testimony of Joseph Rothfield.)

The Court: Overruled. Answer the question if you can, if you understand it. [142]

The Witness: Let me try to understand the question again. Put it up to me, Mr. Hughes.

Mr. Hughes: Read the question.

(Last question repeated by the reporter.)

A. I will leave that to you, Mr. Hughes. You have examined this table time and time again. You know what a piece of 2 by 4, S-4-S, is priced at. You were in the Office of Price Administration, and you know.

Q. (By Mr. Hughes): I want you to answer the question, if you please.

The Court: Answer the question if you can.

A. My answer is yes.

Q. (By Mr. Hughes): That this fixes a price for servicing lumber?

A. For surfacing—s-u-r-f-a-c-i-n-g.

Q. We will call it planing. This fixes the price for planing lumber?

A. That is right; that is sold under this Regulation.

Q. That is sold under this Regulation?

A. That is right.

Q. Does 539 fix the price for planing or surfacing lumber? [143]

A. Under certain conditions.

Q. You still insist that 26 fixes the price for servicing lumber?

A. That is right. That is the only one available.

(Testimony of Joseph Rothfield.)

Q. Mr. Rothfield, did you ever talk to any of these defendants—I mean Mr. Wyman—he is the only defendant now.

A. I have never talked to Mr. Wyman personally.

Q. Have you ever talked to anyone connected with the planing mill, personally?

A. Any talking that has been done by me in reference to this case has been done through you or through Mr. Hitchcock.

Q. You say the investigators have investigated M. A. Wyman? A. Yes, sir.

Q. The O.P.A. investigators? A. Yes, sir.

Q. Who were they?

A. They were Stockdale—Charles W. Stockdale, I believe is the correct name; and Edgar A. Foster.

Q. Are they the only two?

A. I think some time back—but I don't know whether it was in reference—I wouldn't say it was particularly on this case; a Charles H. Edwards.

Q. Anybody else that you know of? [144]

A. And Andrew H. Hitchcock, of course, our attorney.

Q. All of this happened during 1944 and '45, did it not? A. That is right.

Q. Is that correct?

A. That is correct.

Q. Did each of these gentlemen make a report on their findings? A. They have reported.

Q. Just answer the question, please: Did they make a report?

(Testimony of Joseph Rothfield.)

Mr. Hitchcock: I would like to object to that question at this time. I don't believe I went into that question on direct examination as to reports by other investigators and I believe it is therefore improper now.

The Court: Overruled. Did they make a report?

A. They have made several reports.

Q. (By Mr. Hughes): These three that you have mentioned? A. Yes.

Q. Each have made a report? A. Yes.

Q. On this matter? A. That is right.

Q. Have you read those reports? [145]

A. I have.

Q. Where are they now?

A. In the files of the Office of Price Administration.

Mr. Hughes: Mr. Hitchcock, I would like you to produce those reports.

The Witness: They are all considered confidential reports.

Mr. Hughes: I would like to see them, please.

Mr. Hitchcock: All right.

Mr. Hughes: Where is the other one?

Mr. Hitchcock: With respect to the report of Charles H. Edwards, who severed his connection with the Office of Price Control prior to the time I was there, I believe one paragraph of that report which was made——

Mr. Hughes: I am not asking you what the report contains. I am asking you—where is it; have you got it?

(Testimony of Joseph Rothfield.)

Mr. Hitchcock: We have that report but it deals with other matters. It is confidential and not a part of this case. I therefore object to introducing that. It deals with an investigation, a portion of which is still proceeding.

Mr. Hughes: I would like to see upon what basis this witness makes the statements that he has made.

Mr. Hitchcock: The witness came with the Office of Price Administration approximately at the same time I did. The other report was made prior to that time and the man had severed his connection with the agency at the time that we came in there. We know nothing about it other than the fact that there is a report.

The Court: What is that man's name?

Mr. Hitchcock: Edwards.

The Court: Did you ever see the report Mr. Edwards made?

The Witness: I read various reports of Mr. Edwards.

The Court: I mean concerning this matter.

The Witness: I can't recollect whether I read anything pertaining to this particular thing because the reports that I read had to do with another matter.

The Court: Whatever evidence that you have given here, has that been to any extent based upon the report of Mr. Edwards?

The Witness: Very—none whatever.

(Testimony of Joseph Rothfield.)

Mr. Hughes: None whatever. May I ask whether you are going to have Mr. Edwards [147] here?

Mr. Hitchcock: No.

Mr. Hughes: Or Mr. Foxter?

Mr. Hitchcock: No.

Mr. Hughes: Are you going to have the other gentleman——

Mr. Hitchcock: Stockdale?

Mr. Hughes: Stockdale—are you going to have any of those?

Mr. Hitchcock: No.

Q. (By Mr. Hitchcock): Was any of your testimony based upon Edwards' report or investigation? A. None whatever.

Mr. Hughes: In other words, you won't produce the Edwards' report?

Mr. Hitchcock: No. It is on another case.

Q. (By Mr. Hughes): Did you act on these two reports, now, of Mr. Stockdale and Mr. Foster?

A. I have acted on all of the facts as they are accumulated.

Q. As cumulated from what source?

A. Reports, information—confidential information and these invoices and those bills of lading.

Q. Information. Now, you are getting into something [148] else. Where did you get your information?

A. I think that is a matter of confidence. Certain matters of the government I understand are confidential.

(Testimony of Joseph Rothfield.)

Q. It was something told to you, is that correct?

A. No, sir.

Q. Well, it was something written to you, then?

A. My information is all from the facts as presented.

Q. Just from those invoices, is that correct?

A. As to the overcharges.

Q. Yes. Now, was any complaint ever made by any of the buyers from M. A. Wyman or the Granite Falls Planing Mill?

A. I would have to read over the files again to say yes or no.

Q. You know, as a matter of fact, you have never seen any complaint from any buyer from Mr. Wyman, don't you? You can answer that question.

A. In the main I would say no in this case.

Q. In the main. I say have you any? "Any"—do you understand what that means?

A. I can't recall from the files if there are any whatever.

Q. When I use the word "M. A. Wyman" I wish you to understand that I mean also the Wyman Mill Company and the M. A. Wyman Lumber Company; you understood that, didn't you? [149]

A. I understand it is all M. A. Wyman doing business as M. A. Wyman Lumber Company, M. A. Wyman doing business as the Wyman Mill, and M. A. Wyman.

Q. Now, MPR 539 was issued and made effective I think the same day, June 5, 1944, is that correct?

A. I would have to look at the records. It is in June, 1944. I can't recall exactly the date.

(Testimony of Joseph Rothfield.)

Q. Prior to that date, Supplementary Service Regulation 27 to 165—to Maximum Price Regulation 165—covered the planing charges, did it not?

A. Up to June 5, 1944, we would be governed under that Regulation.

Q. And that Supplementary Servicing Regulation 27 was supplanted by 539, is that correct?

A. That is right. 539 came next.

Q. Then Supplementary Service Order Number 27 came out, I think it was in April, 1944.

A. I wouldn't vouch for the date but I think you are about correct.

Q. And prior to that time the services for lumber was governed by Maximum Price Regulation 165, is that correct?

A. That is right.

Q. In other words, 165 was the Service Regulation covering the price for planing lumber in force prior to [150] April, 1944, that is correct, isn't it?

A. Well, I would have to examine that Regulation again to give you a correct answer. I wouldn't want to vouch my answer now on that because it is outmoded and has nothing to do with figuring these invoices. I was duty-bound to figure under 539, the Regulation in effect at the time of this shipment. I cannot vouch for anything previous to that. You are asking me a question that I can't vouch for. I won't try to retain it in my mind—I can't.

Q. You know 165 governed——

A. I don't know. It might have governed many services.

(Testimony of Joseph Rothfield.)

Q. Did it govern services for planing lumber?

A. I don't know.

Q. You don't know.

A. I wouldn't say I don't know. I don't want to answer that question because I would have to have the Regulation put before me to say yes.

Q. Supplementary Service Regulation 27 to 165 became first effective in April, 1944, do you know that?

A. The 27th—are you talking about—S-S-R 27?

Q. Yes.

A. It is approximately April, '44, I believe. I agree with you.

Q. Do you agree with me that 539 supplanted Supplementary [151] Service Order Number 27?

A. That is right.

Q. Was there any inhibition against a person owning a sawmill and a planing mill prior to the issuance of 539 in June?

A. What do you mean by inhibition?

Q. Well, was there any—

Mr. Hitchcock: I believe that that question is a little too general, if the Court please. We are dealing with specific facts.

Q. (By Mr. Hughes): What I wanted to show was that there was no Regulation prohibiting a mill—sawmill and planing mill, even if they were owned by the same person, to charge the rate for planing lumber as fixed by the regulations at that time; that is, prior to June, 1944.

The Court: Answer the question, if you can.

A. I can't answer that question.

(Testimony of Joseph Rothfield.)

The Court: Was there any regulation prohibiting one man from owning a planing mill and a sawmill?

Mr. Hitchcock: We have never objected to the ownership at all, if the Court please. It is the charges they made which hinges on the ownership.

The Court: At the time this corporation was formed was it in violation of any regulation for a man to own two?

Mr. Hitchcock: No.

The Court: No.

Mr. Hitchcock: Not at the time it was formed.

Q. (By Mr. Hughes): As I understand your testimony, Mr. Rothfield, your complaint is that the Granite Falls Planing Mill charged prices provided by 539 without getting permission from the OPA; is that the substance of it?

A. Will you re-state that question, please?

Q. As I understand your testimony, your chief complaint is that the Granite Falls Planing Mill charged prices fixed by 539 without getting permission from the OPA?

A. I have got to say M. A. Wyman in that case.

Mr. Hitchcock: If the Court please, I don't believe that that was the testimony at all.

The Court: He is asking whether that is his opinion or not.

A. (Continuing): It is my contention that M. A. Wyman Lumber Company charged that. You asked me the question and I gave you that answer.

(Testimony of Joseph Rothfield.)

Q. (By Mr. Hughes): Is there anything on those invoices showing that M. A. Wyman charged it?

A. These are invoices taken from the Office of M. A. Wyman. You know that.

Q. Is there anything on those invoices showing that M. A. Wyman charged for this planing?

A. Yes.

Q. Where is it?

A. There is the charge right there for servicing.

Q. Well, M. A. Wyman I said,—M. A. Wyman.

A. Right here.

Q. Where does it say M. A. Wyman?

A. It says "This lumber delivered to our plant by M. A. Wyman."

Q. Well, is that the only reason why you say that; is that the sole reason why you say that M. A. Wyman sold this? [154-a]

A. He certainly did.

Q. Why do you say that?

A. Because the bill of lading says that the M. A. Wyman Lumber Company shipped it.

Q. It doesn't say the M. A. Wyman Lumber Company sold it, does it?

A. You don't send a bill of lading unless you owned the lumber and sell it.

Q. Did you read this, what it says on each one of these invoices; have you read that?

A. Certainly.

Q. On the rough lumber?

A. That is his method of statement.

(Testimony of Joseph Rothfield.)

Q. That is what?

A. "This lumber delivered to the Granite Falls Planing Mill" which is true. The Granite Falls Planing Mill was 500 feet away from the Mill.

Q. "If any prices on this invoice exceed authorized ceiling prices, it is unintentional and proper adjustment will be made if called to our attention." Also there is this note, "This lumber delivered to Granite Falls Planing Mills, Inc., per your instructions to us."

A. Yes, that is right. I will grant that.

Q. Just a minute. "And to be milled and handled by them [155] in accordance with your instructions to them. They will invoice you direct for their charges. The car was billed out by them showing ourselves as shippers and consignors as follows:"

Now, from reading that do you still insist that that by some magic M. A. Wyman sold and delivered surfaced lumber?

A. I must state this, Mr. Hughes: that it is still M. A. Wyman, though Granite Falls shipped it. It is one and the same thing.

Q. Did you find any evidence that would sustain your contention that M. A. Wyman sold this lumber after it was planed?

A. Yes. They sold it surfaced four sides.

Q. Where does it say so?

A. These two bills show that.

Q. That bill says just the opposite, doesn't it; doesn't that bill say just the opposite to what you claim here on this M. A. Wyman Lumber Company

(Testimony of Joseph Rothfield.)

invoice; doesn't it state just the opposite to what you are saying? Does it? A. No.

Q. Doesn't it say there that this lumber is shipped,—“is delivered to Granite Falls per your instructions.” Do you believe that? [156]

A. I do not.

Q. Oh, you don't believe that,—that is it?

A. Yes.

Q. Then you are not relying upon what is in these invoices, are you?

A. No, I am relying upon what is shipped through these invoices. These invoices are an evasive practice under Section 16.

Q. The invoice is an evasive practice? What is evasive about it?

A. Because you shipped 2 by 4's, S-4-S, and 2 by 8's, and 2 by 10's.

Q. Yes; that is right. We shipped that lumber green, didn't we, as shown by the invoices?

A. You shipped it green S-4-S. The bill of lading shows what you shipped.

Q. We only sold green rough lumber, is that correct, as shown by the invoices?

A. As shown by these invoices, you sold green surfaced S-4-S by the combination of two invoices.

Q. You say that. Where does it show on the invoices such as you claim?

You say your information is obtained from these invoices. Now, will you just show the Court from either of these invoices what you claim? [157]

(Testimony of Joseph Rothfield.)

A. These invoices bear the same date, July 17th. They bear the same car number. They bear the same volume of shipment,—33,100 feet of 2 by 6, 2 by 8, 2 by 10, and 2 by 12 green surfaced four sides. That is what left in that shipment.

Q. That is what?

A. That is what Houston Lumber Company got from M. A. Wyman,—the one I am looking at right now.

Q. Doesn't this tell Wyman Lumber Company to send this rough green to the planing mill to be planed; is that what it says?

A. This is a statement on the bottom of the invoice.

Q. Isn't that what it says?

A. I am stating that Houston Lumber Company got 33,100 feet of 2 by 6, 2 by 8, 2 by 12, surfaced four sides.

Q. Yes; they got it.

A. They got it from M. A. Wyman, doing business as M. A. Wyman Lumber Company.

Q. They got it from M. A. Wyman?

A. Yes, sir; doing business as M. A. Wyman Lumber Company. This is evasive; this is trickery.

Q. I see. You have no information upon which you can base that statement except what is shown by the invoices?

A. I have the information. [158]

Q. What is it?

A. 539 states that no sawmill can plane its own lumber under the Regulation 539. And Mr. Wyman

(Testimony of Joseph Rothfield.)

knows it and you know it. You were the litigation attorney at the time.

The Court: Wait, wait. Don't get into any argument.

The Witness: That is the truth. That is the Regulation.

Q. (By Mr. Hughes): It says also that even though one man may own both, under certain conditions they can get permission, doesn't it?

A. To charge custom mill prices except on their own lumber—no matter what—if they have the slightest interest in it, they can't do it. You were our attorney at the time and you know it. You are trying to break me down on it and I won't budge.

Mr. Hitchcock: Mr. Rothfield, that is all right. Just calm yourself. I believe this cross-examination is going far afield. I haven't objected. However, he has asked the same question over and over again. Counsel insists upon re-asking it. I would like to have just a little bit of limit to it.

Mr. Rothfield, I want to answer the questions [159] and contain yourself, please. [160]

Q. Do you mean to say now that the charge for planing lumber was covered by 26?

A. Yes, sir.

Q. And there was no service regulation giving the price of planing lumber? [162]

A. In 1944, you are asking?

Q. Yes, in 1944, if you know.

A. Douglas fir lumber comes under RMPR 26.

(Testimony of Joseph Rothfield.)

Q. That is the sale of lumber?

A. And the surfacing of it, too.

Q. Let me ask it this way: 539, you admit, covers services for planing lumber, doesn't it?

A. Yes, sir.

Q. And that went into effect June 5, 1944, didn't it?

A. Thereabouts.

Q. And prior to that time we had supplemental service regulations 27 to maximum price regulation 165, didn't we?

A. SSR 27, yes.

Q. That was SSR 27 to 165, wasn't it?

A. I think so.

Q. That went into effect, as you said this morning, about April some time? I think it was April 16, but I am not sure of the date, 1944.

A. Either April or May of 1944.

Q. Prior to that time it was governed by 165, wasn't it? In other words, supplementary order 27 was supplementary?

A. Yes.

Q. To 165, wasn't it?

A. I will say yes.

Q. So, then, the service regulations were covered by [163] 165 prior to the issuance of supplemental service order 27?

A. I will say yes. There was a planing provision for lumber, but depending upon what lumber.

Q. They used 539 without getting permission to do so. Is that correct?

A. I would say that is correct. [165]

Q. And if they had had permission to do so, there would be no question for this complaint. Is that correct?

A. I can state here,—

(Testimony of Joseph Rothfield.)

Q. I just asked you that.

A. I want to give the answer in my own way, if you will permit me, sir.

Q. Answer the question. That is all.

A. I will answer the question. Never in history, in the Office of Price Administration, have they authorized a permit to any one to charge 539 prices on the lumber in which they have a financial interest.

Mr. Hughes: I ask that that answer be stricken, and the witness be required to answer my question.

The Court: It may be stricken. Answer the question.

A. I beg your pardon?

Q. (By Mr. Hughes): If the M. A. Wyman Lumber Company had no financial interest in the Granite Falls Planing Mill would there be any cause for complaint here today, under 539?

A. If the M. A. Wyman Company had a financial interest in any way there in the firm, they could not.

Q. If he hadn't, you say?

A. If he hadn't? State the question again, sir.

Q. If M. A. Wyman had no financial interest in the Granite Falls Planing Mill during 1944, would there be any [166] cause for complaint?

Mr. Hitchcock: I believe we are getting into an assumption here, and I would like to object for that reason.

The Court: He may answer.

(Testimony of Joseph Rothfield.)

A. Let me think, now. I can best answer that question by saying——

Q. (By Mr. Hughes): Just a minute. Just answer it, please, yes or no.

The Court: Answer yes or no and then explain if you care to.

A. No, providing that the Granite Falls did not plane any lumber in which they had an interest.

Q. (By Mr. Hughes): Yes. If Granite Falls had planed the lumber and Wyman had no interest in it, then there would be no cause for complaint, would there?

A. If Wyman had no interest in the Granite Falls Planing Mill.

Q. How is that? I didn't hear?

A. If he had no interest in the Granite Falls Planing Mill.

Q. What?

A. No financial interest in any way.

Q. Then the charge——

A. (Interposing): Or owned the lumber, either way.

Q. Then the charges would have been correct?

A. Not in their entirety.

Q. What?

A. There is still a little difference.

Q. You mean there would be no cause for your complaint, there would be no case here today before the Court if Wyman had had no interest in that planing mill?

A. Providing that planing mill was properly authorized to charge these prices.

(Testimony of Joseph Rothfield.)

Q. Yes, that is it. In other words, 539 sets out the charge for planing lumber by a custom mill, and it is defined that a custom mill cannot operate and charge prices under 539 if the owner of the saw-mill has a substantial interest in the planing mill?

A. Or vice versa.

Q. But 539 goes on further, doesn't it, and states that there are certain conditions, even where the ownership is in the same party, an application may be granted under certain conditions, doesn't it?

A. That is right.

Q. I am not trying to mix you up. I am just trying to get straight on that.

A. That is all right. I will answer you to the best of my knowledge.

Q. That has to be done by an application to the OPA? A. Right. [168]

Q. Now, do you know whether an application was made by the Granite Falls Planing Mill to the OPA for the privilege of operating under 539?

A. I think that can be best answered by the department that takes care of that.

Q. I ask you: Do you know of any letter of application, or have you seen a letter of application by the Granite Falls Planing Mill addressed to the Office of Price Administration, asking for permission to operate under 539?

A. No, I never saw that application.

Q. You have never seen it?

A. No, sir.

Q. You say you have investigated this case?

A. I haven't seen the application to operate under 539.

(Testimony of Joseph Rothfield.)

Q. You have not investigated any of these facts that tend to show any justification for this charge, have you? A. I have investigated.

Q. You didn't investigate that? You do not know about that phase of it, do you?

A. I say that there was no application from M. A. Wyman to operate a custom mill under MP 539.

Q. I said Granite Falls. I didn't say from Wyman.

A. Or Granite Falls, under 539.

Q. Is there, under any other regulation? [169]

A. I have seen correspondence regarding SSR-27.

Q. Twenty-seven, the third of May was the date that supplemental service order 27 came into effect, wasn't it? A. That is right.

Q. May 3? A. Yes.

Q. And you have seen that application?

A. I have seen **that letter**.

Q. Of application? A. Yes, sir.

Q. For permission to operate under 27, which contains substantially the same provisions as 539?

A. Approximately.

Q. And do you know what became of that application?

Mr. Hitchcock: If the Court please, the man who handles that is here. I have a man here who will be our next witness, and he will have all the information on that, and I think he has a copy of the letter and we will be glad to introduce the same in evidence.

(Testimony of Joseph Rothfield.)

The Court: Answer the question.

The Witness: Will you re-state the question, Mr. Hughes?

Q. (By Mr. Hughes): Have you read that letter? A. I have read that letter.

(Letter marked Defendants' Exhibit A-2 for identification.) [170]

Q. Handing you defendants' exhibit A-2, I will ask you if that is the application that you saw?

A. I think this is substantially the letter I read in the files.

Q. In whose office?

A. In our office,—May 3, 1944.

Q. In Mr. Wurnsted's office or yours?

A. Mr. Wurnsted's office.

Q. That is the application by the Granite Falls Planing Mills dated May 3, 1944? A. Yes.

Q. Addressed to the Regional Office of Price Administration, for permission to operate under regulation—under MPR-165, and supplemental regulation 27, effective May 3, 1944?

A. That is right.

Mr. Hughes: I offer that.

Q. Do you know what was done with that application?

A. That is not in my department, sir.

Q. I say you do not know what was done with it?

A. The answer is it is not in my department, so what was done with the application—

Q. I will ask you if you—

(Testimony of Joseph Rothfield.)

A. I can't answer that. All I can say to that is: I don't know. [171]

Q. You have discussed this with Mr. Wurnsted, haven't you? A. Yes.

Q. When?

A. Several times, the same as you have; discussed it several times.

Mr. Hitchcock: I have no objection to that.

The Court: This may be received.

(The document previously marked defendant's exhibit A-2 for identification was admitted in evidence.)

DEFENDANT'S EXHIBIT A-2

[Letterhead Granite Falls Planing Mill, Inc.]

May 3, 1944.

Regional Office
Office of Price Administration
White Henry Stuart Bldg.,
Seattle, Washington

Gentlemen:

Reference: MPR 165 Supp. Service

Reg. 27—Effective May 3, 1944.

Under Part 1499.2258 Section 3 Paragraph (b), the undersigned hereby applies for authority to operate under this regulation, and offers the following facts in support.

Our plant is located near Granite Falls, Washington. Our equipment consists of a steam powered

(Testimony of Joseph Rothfield.)

lumber planer and a loading and unloading crane. At Hartford, Washington, which is our Railroad loading point, we have a platform and unloading and loading crane. This is located approximately 12 miles from our plant, and the OPA lumber division has given us authority to charge \$1.50 per M' truck charge.

There are many small Rough tie mills in this neighborhood from which we buy Rough Boards and Dimension and surface it to make it available for the war effort. If we did not operate this plant, this Rough "side cut" would for the most part be burned as waste.

The war demand for surfaced lumber is exceedingly great, but little Rough lumber is bought and as there is no other plant of this kind in this vicinity, we believe we are contributing something to the war effort. Our capacity is approximately 40 M Ft. per day.

As we do not have any resaw or equipment to break down larger sizes, any lumber handled by us is at a saving over those plants that do charge for breaking down larger sizes and also surfacing the product.

We hope you will give this your early consideration.

Yours very truly,

GRANITE FALLS PLANING
MILL, INC.

By /s/ M. H. WYMAN.

MH:s

Admitted Sept. 27, 1946.

(Testimony of Joseph Rothfield.)

Q. (By Mr. Hughes): Handing you supplemental service regulation 27 to maximum price regulation 165, that became effective on May 3, 1944, didn't it? A. That is right.

Q. And the consideration for that reads as follows:—I want you to see if I read it correctly. “ ‘Custom mills’ are specially defined in the regulation. Some persons who do not come within the scope of that definition may not be performing custom mill service. Such persons may apply to the nearest regional office of Price Administration for permission to charge the maximum prices provided by this regulation. Such permission will be granted in those cases in which it is found that the authorization: [172]

(1) Will result in a greater production of surfaced boards or dimension of kiln-dried lumber.

(2) Will not encourage producing sawmills having manufacturing and kiln-drying facilities to ship their lumber green, partially dry, rough or in thicknesses over 2”.

(3) Will provide necessary milling services which can not reasonably be supplied by producing mills, or by custom mills qualifying under paragraph (a).

(4) Will not result in unnecessarily increasing the cost of finished lumber to the ultimate consumer.”

Does that regulation so provide?

A. Let's refer to the regulation.

Q. That is 27?

(Testimony of Joseph Rothfield.)

A. Yes. I don't know if the consideration applies. That is the regulation, although——

Q. That is what it states?

A. I will admit that. It goes a little further, too, doesn't it? That same consideration goes a little further, I believe.

Q. I don't want to skip anything: "If such permission is refused, the operator must use the charges provided in the appropriate lumber price regulation." A. That is right.

Q. If it is refused? A. Correct. [173]

Q. Did you investigate to find out whether the Granite Falls Planing Mill Company qualified under these provisions?

A. I don't have to go back into that part. All I was concerned with——

Q. Just answer my question: Did you investigate the Granite Falls Planing Mill to find out whether they could qualify under these provisions, these four I have just read?

A. I am interested in——

Q. (Interposing): You answer the question.

A. You are talking——

The Court: Wait a minute. Answer the question and don't argue so much. Answer his question.

The Witness: State the question again.

Q. (By Mr. Hughes): Did you investigate the Granite Falls Planing Mill?

A. I didn't have to go back into that part. All I was concerned with——

(Testimony of Joseph Rothfield.)

Q. (Interposing): Just answer my question. Did you investigate the Granite Falls Planing Mill to find out whether they could qualify under these provisions, these four I have just read?

A. I am interested in——

Q. (Interposing): You answer the question.

A. You are talking——

The Court: Wait a minute! Answer the question and [174] don't argue so much. Answer the question.

The Witness: State the question again.

Q. (By Mr. Hughes): Did you investigate the Granite Falls Planing Mill to find out whether they could qualify under these four provisions?

A. Yes.

Q. You did investigate? A. Yes, sir.

Q. What investigation did you make?

A. Through the regular channels, that the plant was under one roof.

Q. Through regular channels. Did you investigate it yourself?

A. Through our department.

Q. Well, I want to ask you——

A. (Interposing): I did not.

Q. What did you find yourself?

A. I didn't go out to the plant, if that is what you want to know.

Q. Did you investigate yourself?

A. Our department did. I didn't investigate it at that particular moment you are asking for.

(Testimony of Joseph Rothfield.)

Q. And you did not know whether they could qualify under these provisions or not, at that particular time, did you? [175]

A. At that particular time, I will say no.

Q. If the Granite Falls Planing Mill had been unable to surface this lumber, where else could it have been done in that community?

Mr. Hitchcock: I object to that unless he qualifies it as to his own knowledge.

Q. (By Mr. Hughes): Yes, if he knows.

The Court: Answer if you know.

A. I don't know.

Q. (By Mr. Hughes): You don't know?

A. Except I do know that Granite Falls and the Wyman Lumber Company is one institution.

Q. You stick to that, do you?

A. I certainly do.

Q. You did not investigate, though, to find out whether there was a competing mill with the Granite Falls Planing Mill?

A. I didn't go seeking out other mills.

Q. Did you ever hear of the Walton Lumber Company of Everett?

A. Yes, and the Warren Lumber Company and another over at Anacote.

Q. I am speaking of Everett now. How far is Granite Falls from Everett?

A. Possibly ten or twelve miles, roughly. [176]

Q. Is there a planing mill nearer to Everett than Granite Falls?

A. I don't know.

Q. You don't know?

(Testimony of Joseph Rothfield.)

A. I don't like to be confined to the Everett Mill, but I know Walton Lumber Company are in Everett, about twelve miles from Granite Falls.

Q. MPR-539 contains the same requirements as 165, for custom milling, doesn't it?

A. SSR-27 to 165?

Q. Yes.

A. Well, approximately, although there might be a little different wording.

Q. As far as you know, they are the same?

A. About the same. That can best be determined by the department that has charge of making the regulations, which would not be through the Price Division.

Q. You do know, however, if the buyer had bought and had this planing service done at Everett, or the nearest point to the mill, it would have cost him more than it actually cost him for the Granite Falls Mill to do it?

Mr. Hitchcock: I believe that is wandering far afield and asking him for an opinion, and for a conclusion in addition. [177]

Mr. Hughes: If your Honor please, I am just trying to show that if this planing had been done by any other mill, they would have been entitled to charge custom milling services for it.

The Court: The Court had ruled. Proceed.

Q. (By Mr. Hughes): Now, you say the Granite Falls Planing Mill serviced lumber for M. A. Wyman. You say that? A. Right.

(Testimony of Joseph Rothfield.)

Q. And you base that, not on the invoices, but on other information?

A. I base that on the invoices and the position of the plant.

Q. You base that on the invoices?

A. Yes.

Q. And that is all you did base it on?

A. And the billings.

Q. You claim that this was sold in excess of 539?

A. I claim it was sold in excess of RMPR-26.

Q. Where do the invoices show that M. A. Wyman surfaced this lumber?

A. Because these invoices came from M. A. Wyman Lumber Company.

Q. They were ordered to be shipped that way, weren't they?

A. They were ordered,—If you take the typing on [178] the invoice, I would say yes.

Q. I believe you said that this plaintiff's exhibit 6, on the right side here, showed the overcharges, the total amount that you figured out. Is that correct?

A. That is right.

Q. And you say that shows the overcharge after taking out the cartage?

A. That is right.

Q. You are sure of that?

A. I am sure of that.

Q. And where did you figure that amount?

A. On those invoices?

Q. Yes. What is the overcharge?

A. \$184.44.

(Testimony of Joseph Rothfield.)

Q. That is what you found was the overcharge?

A. Yes.

Q. That doesn't show up on this exhibit 6, does it?

A. You have got exhibit 6. That is part of exhibit 6 right there.

Q. Exhibit 6 of page 4, your honor.

A. The fourth one down.

Q. I am speaking of the figure in this place, is what I am referring to. That shows \$237.93.

A. That is taking off the cartage. This is the figure right there. [179]

Q. That is not correct, then? That statement does not purport to be correct?

A. The recapitulation takes care of that.

Redirect Examination

By Mr. Hitchcock:

Q. Do you know what regulation the defendant was subjected to, with reference to the surfacing of lumber? Do you know whether it was 539 or SS27, were in effect from July to December, 1944?

A. Yes.

Q. Which one was in effect?

A. MPR-539. [180]

WILLIAM C. WURNSTED

called and sworn on behalf of the plaintiff, testified as follows:

Direct Examination

By Mr. Hitchcock:

Q. Will you state your name, please?

A. William C. Wurnsted.

Q. What is your occupation?

A. I am head of the building materials and lumber division of Price,—in the Seattle District Office of the Price Administration.

Q. How long have you been employed and what are your duties?

A. Well, I have been employed there since September, 1942. My duties are, at the present time, the dissemination of information, naturally, running the division that I am head of, contacting the public on items in regard to—Or discussions in regard to the OPA regulations. [182]

Q. (By Mr. Hitchcock): Go ahead.

A. Then he explained to me that there were a lot of mills in the district that had no planing facilities, and that there was a war on and we needed lumber, and needed it badly,—and I certainly agreed with him that we did need lumber and needed it badly. I think I said to him that if he had the additional capacity for surfacing lumber, and wanted to make an application under 165, for the price that he made, that he might be permitted to do some custom milling on lumber other than his own, but there was this 165 that prohibited it at that time.

(Testimony of William C. Wurnsted.)

Q. When was that?

Q. (By Mr. Hughes): What Wyman did you talk to?

A. I talked to Mr. Wyman, Sr., and that is Mr. M. A. Wyman.

Q. (By Mr. Hitchcock): All right. Go ahead.

A. A little later on and I believe during our conversation, he also explained to me how he acquired the mill, and that the thing had been a losing proposition. [185]

Q. That is the Wyman Mill you are referring to?

A. That is right.

Mr. Hughes: Are you speaking of the planing mill or the Wyman Mill?

Mr. Hitchcock: The Wyman mill.

The Witness: A little later on his son came in. I think it was at that time. In fact, I am certain of it, and we agreed that we would go up and check the plant.

Q. (By Mr. Hughes): That is up to the planing mill?

A. That is take the whole industry, the whole plant, with the idea in mind of establishing a rate under 165 that he could use, providing we could establish this new surfacing charge; but I explained most emphatically to him that I could not add new manufacturing or planing charges that a custom mill might charge to any lumber which he may manufacture of his own. Now, that is my recollection of the thing, to the best of my ability.

(Testimony of William C. Wurnsted.)

Q. (By Mr. Hitchcock): Now, Mr. Wurnsted, pursuant to this conversation, did the defendant ever file an application for such a permit?

A. Well, in the interim,—Let me explain it this way: supplemental regulation 27 to 165 was developed. I would like to say why it was developed.

Q. Go right ahead.

Q. (By Mr. Hughes): Did you help develop it?

A. I did not.

Q. Do you know why it was developed, from the statement of the consideration and other reasons in connection with your duties?

Mr. Hughes: Well, I object to that.

The Court: Well, I think the Court can read the considerations, yes. Go ahead. I don't care about that.

Q. (By Mr. Wyman): Pursuant to this conversation, will you go ahead and state whether or not an application was filed under SR 27?

A. Yes, an application was filed.

Q. When? A. On May 3.

Q. What year? A. 1944.

Q. And at that time, under the regulations, that is 27, were there certain requirements that should be in that application? A. Oh, yes.

Q. What were those requirements?

A. Primarily, one of the requirements was that the applicant had no interest in a sawmill?

Q. I mean, did the application set forth this fact?

(Testimony of William C. Wurnsted.)

A. That is right, the application very specifically, under, I believe, section 3, explains what a custom mill is [187] and section B,—or section 2 of section,—That is paragraph 2 of section 3 outlines one of the requirements, and it also explains what lumber prices, these prices established herein, can be applied on; that is the species of the lumbers. B goes in great detail as to operators not qualifying under the paragraph A.

Q. Was this application in proper form under these provisions? Did it say anything about ownership? A. No, it did not.

Q. Should that have been in there at that time?

A. Yes, it should have been in there at that time.

Q. With reference to SR-27, what period of time did that regulation cover?

A. Number 27 went into effect on—Was issued April 18 and became effective May 3.

Q. 1944?

A. 1944. And was superceded by MPR 539 on June 5, 1944.

Q. Could any custom milling price have been charged by the defendant prior to the time that authority was acted upon, under either of these regulations?

Mr. Hughes: What was the question?

Q. (By Mr. Hitchcock): Could custom mills charges have been charged under either of these regulations by the applicant, the Granite Falls Planing Mill, prior to authorization [188] pursuant to the application? A. No.

(Testimony of William C. Wurnsted.)

Q. Do you know——

Mr. Hughes: Give me the figures upon which you base that answer.

A. No,—The applicant——

Q. Well, could they or could they not?

The Court: Better repeat the question.

Q. (By Mr. Hitchcock): Could custom milling rates under either of these regulations have been charged by the applicant, that is the Granite Falls Planing Mill, until the authority had been granted?

A. No, positively.

Q. Did MPR 539 go into effect shortly thereafter?

A. It went into effect June 5, 1944.

Q. Did MPR 539 contain several similar provisions with reference to charges in custom milling?

A. Yes, that is right.

Q. Was any application ever filed under MPR 539?

A. Not to my knowledge.

Q. Now, do you know of your own knowledge what what regulations governed customs milling, surfacing, on Douglas fir, during 1944, from July to December,—customs milling?

A. MPR 539.

Q. And do you know what regulation governed surfacing [189] of Douglas fir during 1944? Did any other regulation cover that?

A. If the surfacing was done by a custom mill, properly licensed, 539 was applicable. If the surfacing was done by any one else, it was subject to MPR-29. [190]

(Testimony of William C. Wurnsted.)

Cross-Examination

By Mr. Hughes:

Q. You were formerly in the lumber business here in Seattle, weren't you? A. Yes, sir.

Q. That was prior to your employment by the OPA? A. Yes, sir.

Q. And you have been here for a great many years?

A. That is right; since about 1919.

Q. Did you receive an application from the Granite Falls Planing Mill dated May 3, 1944, to operate under MPR-165, under that service regulation 27? A. I did.

Q. And that is the same as 539 now?

A. No, I wouldn't say it was the same.

Q. Substantially the same? [196]

A. Yes, the regulations are substantially the same. Our price at that time was specifically made under 27 to 165.

Q. And it just happens to be on May 3rd, the same date that 27 came into effect?

A. I believe I saw to it that he got a copy of that 27. I am not sure.

Q. Now, handing you defendant's exhibit A-2, I will ask you if that is the application that you received on or about May 3, 1944?

A. Yes, that is it.

Q. That was signed by the Granite Falls Planing Mill by H. M. Wyman?

A. That is right, by M. H. Wyman.

(Testimony of William C. Wurnsted.)

Q. And it is addressed to the Regional Office, Office of Price Administration, Seattle, Washington?

A. That is right.

Q. And that is the address of the District Office of the OPA?

A. That is the address of the District Office, but not the Regional Office. It is addressed to the Regional Office, by the way.

Q. But he had it addressed to Seattle instead of San Francisco?

A. That is right. [197]

Q. How did it happen to reach your desk?

A. Well, through the usual course of mail.

Q. You handle that kind of business, these applications, do you?

A. That is right. That is it comes to my desk.

Q. Was that application discussed by you and M. H. Wyman on behalf of the Granite Falls Planning Mill?

A. Not that I remember.

Q. You don't remember?

A. No.

Q. You don't remember any discussion between you and M. H. Wyman?

A. Other than the fact that,—But I do remember discussing the application with him. My discussion with M. H. Wyman was to the effect that we were going out to the mill.

Q. What are you reading from there?

A. It is a card from Mr. M. H. Wyman. If I remember, M. A. Wyman Lumber Company, that is all. Just a few notes of my own.

Q. You say you did not have any discussion with M. H. Wyman at all?

(Testimony of William C. Wurnsted.)

A. I don't remember discussing the application with Mr. Wyman at all. I did make the arrangement with him. That I was going to the sawmill with him. [198]

Q. You did tell him that?

A. I did tell him that.

Q. And do you remember H. M. Wyman, this young man sitting right here?

A. Even now, I wouldn't be sure whether that is M. H. Wyman.

Q. Do you remember this young man coming to your office and bringing that application?

A. I wouldn't say that was the young man. It was M. H. Wyman that is the man that gave me the card.

Q. This happens to be M. H. Wyman sitting right here. He is the one that gave you the letter, is he?

A. I don't know.

Q. You don't remember how you received it?

A. No, sir.

Q. But you did receive it on or about that date?

A. Yes.

Q. I think you stated this morning you discussed this with M. A. Wyman?

A. That is right.

Q. Didn't you take this application up to the office, which happened to be in the same building, and held this application in your hand and introduced yourself to M. A. Wyman?

A. No.

Q. Just a letter—

A. I had this other letter from Lew Chervais in my hand.

(Testimony of William C. Wurnsted.)

Q. But you didn't bring this letter of May 3rd?

A. Yes, sir.

Q. And no discussion was had with M. A. or M. H. Wyman, either one?

A. I don't remember.

Q. You don't remember walking up to the office to discuss it with them?

A. I discussed Mr. Chervais' letter with M. A. Wyman.

Q. You discussed Mr. Chervais' letter with M. A. Wyman? A. That is right.

Q. And he is the only one that you talked to?

A. That is right.

Q. You are sure of that? That is as well as your memory serves you? A. Yes, sir.

Q. But you may have forgotten what happened?

A. I am pretty sure of that.

Q. Now, did you tell Mr.—You say you told M. A. Wyman that you would go up to the mill and look it over and see what could be done?

A. Yes, sir; I did.

Q. And you told him you would let him know?

A. No. It went a little farther than that. I told [200] him that——

Q. What was the date of that, about?

A. Oh, it was some time—I think the time when I mentioned going to the plant, to the mill, with him was at the time I saw that card at his office.

Q. And when was that? Try and fix the time.

A. Well, approximately right shortly after I received that letter from Mr. Chervais.

(Testimony of William C. Wurnsted.)

Q. That letter is dated March 3rd, isn't it, 1944?

A. Yes, I believe that is what it is.

Q. And you think you were there shortly after you received that letter?

A. Yes, that is right because I had a specific job to do, according to that letter.

Q. Did you ever make another trip to that office? A. No, sir; I never.

Q. And you don't remember anybody discussing this letter with you after May third?

A. No, sir.

Q. You remember talking to me about this a couple of weeks ago, don't you? A. Yes.

Q. You came down and talked to me, just what happened? A. Yes.

Q. Yes. I said I would like to know just what [201] happened?

A. I told you very frankly that I would have to go over my file in order that I could refresh my memory. If I remember, that is exactly what I said to you.

Q. That is right. And then you went over your file and had another conference with me. You wouldn't talk to me unless some one else was present?

A. To my mind, that conversation was——

Q. I just asked you the question. Isn't that a fact? A. Repeat the question.

Q. I had another conference with you?

A. You did.

(Testimony of William C. Wurnsted.)

Q. In which you would only talk to me in Mr. Hitchcock's presence? A. That is right.

Q. And at that time you said Mr. Hitchcock would have to be present? A. Yes.

Q. And I said I would just like to know what the facts are? Do you remember that?

A. Yes.

Q. And you told me you didn't remember except this: That you took this application upstairs and you talked to M. A. Wyman, and M. A. Wyman said, "I don't know a thing about it. You will have to see my son." And he took you [202] in and introduced you to his son?

A. I think Mr. Hitchcock objected and wouldn't let me answer the question.

Q. You did say that, didn't you?

A. Never.

Q. And you told me frankly that you really didn't remember what did happen. Isn't that the fact?

A. I will try to see if I can think of the words said, if I said anything.

Q. Well, that was the substance of it, wasn't it?

A. No, that is too broad a statement. I wouldn't admit that under any circumstances.

Q. As a matter of fact, you have never told me a lot of this testimony you have given here today?

A. That is a fact. I really didn't.

Q. You didn't tell me at all about that?

A. That is right. [203]

(Testimony of William C. Wurnsted.)

Q. (By Mr. Hughes): Now, Granite Falls is about 40 miles from here, isn't it?

A. That is right.

Q. And didn't H. M. Wyman tell you that he would take you out there to see the mill?

A. Yes.

Q. So you did talk to M. H. Wyman, didn't you?

A. Yes, I admit I did talk to him.

Q. After you received this letter of application?

A. No, sir; I don't know whether I talked to him after the application, from memory right now, as I said before in my statement. I think M. H. Wyman came into the office shortly after—just about the time I had my discussion with his dad, because if I remember correctly his dad introduced me to him, and it was at that time that we made the arrangement to go out to the mill; yes, sir.

Q. What were you going out to the mill for?

A. I wanted to see what kind of a plant it was, and—I had one other definite reason. We were at war and if he had any extra capacity left for surfacing, and if it could be arranged that he could get permission to surface some of this green lumber that the other lumber mills had no facilities for surfacing, and handle it strictly in the capacity of a customs miller, on lumber other than his own, I was perfectly willing to do everything I could towards accomplishing this end. [204]

Q. He wouldn't have to get your permission if he was working on lumber he didn't manufacture, would he?

(Testimony of William C. Wurnsted.)

A. He certainly would, for three reasons.

Q. Listen. Couldn't he operate under 539?

A. No, sir, because he owned the sawmill and was cutting logs.

Q. If he hadn't owned the sawmill and didn't furnish his own lumber, there is no reason why he should consult you whether he could operate under 539, was there?

A. Oh, yes. He had a joint ownership with the sawmill. He knew that.

Q. How many times did M. H. Wyman call you and tell you he would be glad to take you up?

A. Once, I remember.

Q. Didn't he tell you he went up about twice a week?

A. Yes.

Q. And he would take you up any time you wanted to go?

A. Yes.

Q. And he called you to go up with him?

A. Yes.

Q. And you couldn't go?

A. I couldn't go.

Q. Didn't he tell you he might be able to go some other time?

A. That is right.

Q. Did you ever call him?

A. No, sir; and he never called me.

Q. You never did visit the Granite Falls Planing Mill?

A. No, sir; I did not.

Q. You never did?

A. No, sir.

Q. Didn't you say you received instructions from Lewis Gervais to inspect the mill?

A. I didn't have to go out to the mill. I went back and talked to Mr. Wyman. I told him what

(Testimony of William C. Wurnsted.)

was what. That is all. I don't inspect mills under any circumstances.

Q. All right. What did you do with this application made on May 3, 1944?

A. Well, it laid on my desk, I imagine, together with a lot of other work, came to my attention again eventually. By that time we had MPR-539, which changed things materially and the application was, therefore, no good, since it would have to be made under 539 rather than supplemental regulation 27. So I called up Wyman.

Q. You called him up?

A. I called up the company.

Q. Which Wyman? [206]

A. I called up the M. A. Wyman Lumber Company. [207]

Q. What did you finally do with the application?

A. I figured that—I left my——

Q. I say what did you finally do? I didn't ask you what you figured. I asked you what you finally did with the application.

A. I imagine it was filed away.

Q. And that was all that was done with it?

A. That was all that was done with it, apparently.

Q. Nothing was ever done with it after that?

A. That is right.

Q. (By the Court): Mr. Witness, when you say you called the Wyman Lumber Company, did you talk to anybody there on that occasion?

(Testimony of William C. Wurnsted.)

A. No, sir. I talked to the girl there, because I asked for M. H., and I believed I mentioned the fact that I was going to the mill with him; and her reply was to the effect that M. H. was in the house or that he was ill, or that there was some reason why he couldn't be there. I said "I am calling him up in regard to the trip." I said, "I was going to make with him to the mill." That is all I remember about it, Judge.

The Court: All right.

Q. (By Mr. Hughes): Handing you defendant's exhibit A-3, I will ask you if that is your signature? [208]

A. Yes, sir; that is my signature.

Q. And you wrote that, addressed to the Granite Falls Planing Mill?

A. That is right.

Q. And what is the date of that?

A. That is dated May 5, 1945.

Q. That is a year and two days after you received the application?

A. That is right. I had orders to write that letter, instructions.

Q. Instructions from whom?

Mr. Hitchcock: That is all right. Admit it.

The Court: It may be admitted.

(Letter admitted in evidence and marked defendant's exhibit A-3.)

(Testimony of William C. Wurnsted.)

DEFENDANTS' EXHIBIT A-3
[Letterhead Office of Price Administration]

In Reply Refer to: 8Se:WCW (P)

May 5, 1945

Granite Falls Planing Mill, Inc.

Box 237

Granite Falls, Washington

Attention: M. H. Wyman

Dear Mr. Wyman:

We are returning herewith your letter of application of May 3, 1944, in which you made application under Supplementary Service Regulation 27 to Maximum Price Regulation 165 to qualify as a custom milling plant.

I discussed this application with you shortly after receipt of this application with the idea in mind of inspecting the mill. This inspection was never made inasmuch as I never heard from you regarding this matter, and the further fact that on June 5, 1944, Maximum Price Regulation 539 became effective superseding Supplementary Service Regulation 27 to Maximum Price Regulation 165.

This new Regulation on custom milling and kiln drying of western softwoods changed the qualifying requirements of the original order to a certain extent and outlined specifically the information which should be provided in all instances where a

(Testimony of William C. Wurnsted.)

mill does not qualify as was then outlined in Section 4 of Maximum Price Regulation 539.

Therefore, inasmuch as your application will not meet with the requirements outlined in Maximum Price Regulation 539, we are returning it to you.

Very truly yours,

REED C. MILLS

District Price Executive

/s/ WM. C. WURNSTED

District Merchandise

Specialist

1 Encl. Your application.

Copy to: Mr. A. H. Hitchcock, Room 4451

Admitted Sept. 27, 1946.

A. From Mr. Foster.

Q. You had instructions from Mr. Foster?

A. Yes, sir.

Q. Have you got those instructions?

A. He just told me, he says, "You better return that application." And that is what I did.

Q. (By Mr. Hughes): Now, that letter was the first and only notification you ever gave to the Granite Falls Planing Mill, wasn't it?

A. So far as that application was concerned, yes, sir.

Q. Why did you keep the application a year and two days before doing anything about it?

Q. Well, so far as I was concerned, if they hadn't requested me to return it, it would still be there.

(Testimony of William C. Wurnsted.)

Q. Is that your usual practice, when you take an [211] application for a price?

A. Not necessarily.

Q. Not necessarily? A. No.

Q. But is it usual, I say? A. No.

Q. In fact, do you throw them in the waste basket or put them on file without answering them?

A. I did answer that. I called Mr. Wyman over and told him I was going out to the plant. As far as I was concerned, they had given us the original. That was only for a special permit for custom milling of lumber other than their own.

Q. If you were going out to the plant to find out what you would do with the application, you should at least notify them that you had been out and done something about it? A. I called them up.

Q. You mean you called them up when?

A. I called them up shortly after 539 went into effect.

Q. Do you remember doing that, or are you saying it?

A. No, I remember it distinctly, because——

Mr. Hitchcock: I object to that as repetition.

The Court: Sustained.

Q. (By Mr. Hughes): Didn't you tell Mr. Hitchcock you had forgotten all about this thing?

A. No, sir. [212]

Q. (By Mr. Hughes): Didn't Mr. Hitchcock tell you in his letter to tell Granite Falls Planing Mill——

(Testimony of William C. Wurnsted.)

Mr. Hitchcock: The letter that was referred to was from Mr. Foster, my investigator, and has so been testified to.

Mr. Hughes: If your Honor please, he said he wrote this letter because he was ordered to do it.

The Court: By Mr. Foster?

Mr. Hughes: Yes, by Mr. Foster.

Q. (By Mr. Hughes): Mr. Foster was under Mr. Hitchcock, wasn't he? A. I imagine so.

Q. (By Mr. Hughes): You say in your letter, there, that they didn't conform to the Regulation, is that right—your letter of May 5, 1945?

A. That is right.

Q. Why didn't you tell them at the time you received the application?

A. Well, if you want to know the truth, the application was so ridiculous because it didn't cover any of the requirements of SSR 27.

I thought that after I went out to see the plant I would go up and show them how to write this application. But frankly, I thought they forgot it—the letter was filed away; I never heard from them after I did make the second call.

Q. You say the letter was filed away. Do you mean you filed it away?

A. Their application apparently was filed away.

Q. And you lost track of it?

A. That is right. It is up to them to get the permission.

Q. Then your letter of May 5, 1945, just ex-

(Testimony of William C. Wurnsted.)

presses the view of Mr. Foster, is that correct; it didn't express your views, or did it?

A. I wrote this letter.

Q. Yes.

A. Apparently it expresses my views. [214]

Q. But you said you were ordered to do it.

A. I was ordered to return the application; that was all.

Q. You were ordered by Mr. Foster.

A. That is right. He says, "Why don't you return the application?"

Q. Did Mr. Foster have anything to do with you?

A. Well, at that time I was a little green pea down there and more or less if somebody barked hard enough maybe I did it.

Q. You mean in 1944 you were a green pea?

A. That is right; that is May 3, 1945.

Q. How long had you been a "green pea" with the O.P.A.?

A. Well, maybe I am still a "green pea."

Mr. Hitchcock: Just a moment.

Q. (By Mr. Hughes): How long have you been with the O.P.A.?

Mr. Hitchcock: Just a minute. I appreciate this is interesting but we are wandering afield, I think, in discussions of "green peas." If Mr. Hughes would qualify his questions.

Q. (By Mr. Hughes): When did you say you first went with the O.P.A.?

A. September, 1942.

(Testimony of William C. Wurnsted.)

Q. And in '45, you had been with them for three years? [215]

A. That is right. And if you remember right, I have always been extremely anxious to cooperate with the Enforcement Division. I thought if I could help them I would do it and that is why I did it.

Q. I see. Now you know that 165 provides an application for a price must be approved or disapproved within ten days, doesn't it—165?

A. I couldn't say.

Q. I will show it to you.

A. Even if you showed it to me, it is up to our attorney—the Price Attorney to ask a legal question. That is up to him on all regulations that are not regulations that my department works with.

Q. I see. Now, I am going to call your attention to MPR 165 which is in effect until May 3, 1944.

A. Wait a minute. I will look at this just the way I want to look at it.

Q. Yes; take your time.

A. This Regulation that you are showing me here has only got amendments 18 and that is up to December 31, 1942.

Q. Well, had there been any changes in this in '42?

A. Undoubtedly; but you said 1944. Then you show me a 165 of 1944.

Q. Well, have you one? [216]

A. I haven't got any.

(Testimony of William C. Wurnsted.)

Mr. Hitchcock: Mr. Wurnsted, have you SSR-27 which is the Regulation concerned?

The Witness: Yes, I have.

Mr. Hitchcock: Does that Regulation have any 10-day period?

The Witness: No, sir.

Q. (By Mr. Hughes): Does it fix any time?

A. It does.

Q. What time does it fix?

A. It fixes the time this way—the time is indefinite.

Q. (By Mr. Hughes): You have been familiar with most of the regulations concerning lumber, haven't you, and planing? A. Yes, sir.

Q. Are there any Regulations that you have read that give you more than thirty days to approve or to disapprove a Regulation—an application, rather, for price?

A. I don't remember any regulation in the lumber field where you find that clause. That clause may be in a few of the other Regulations—possibly to groceries, or applications for shoe repair or something like that; especially those in 165. But it isn't in the lumber Regulation and certainly it isn't in SS-165 or 29 or 36 or 40.

Q. You say it is not in 165.

A. I didn't say it wasn't in 165.

Q. You didn't say that?

A. No, sir. I told you that I wouldn't even attempt to answer 165.

(Testimony of William C. Wurnsted.)

Q. You know, as a matter of fact, that these regulations do provide a time within which an application must be [219] approved or disapproved, it shall be deemed to be approved?

A. That is just so much hogwash so far as the lumber regulations are concerned.

Q. It is. You feel then, that you had a right to keep this application for a year and do nothing with it at all?

A. That is right. If they were interested in getting this special permission, they were just as close to me as I was to them, and surely I was doing a heck of a lot more work than they were doing. I was even going out of my way to make the call to look at their plant.

Q. You knew on May 5, 1945, that this alleged violation had occurred some time prior to that date, didn't you?

A. I don't get the question at all.

Q. You knew when you wrote that letter on May 5, 1945——

A. I knew that the investigation was going on, yes; that Mr. Foster had a reason for it.

Q. That tells you, that you got from Mr. Foster, that the investigator intended to bring suit or words to that effect, didn't it? A. That is right.

Q. So you knew that suit was coming up? [220]

A. That is right.

Q. And you wanted to excuse your delay by sending it, even though you had held it?

A. No, I am not excusing myself for anything. It was up to them——

(Testimony of William C. Wurnsted.)

Mr. Hitchcock: I object, if the Court please, to the form of the last question and the several before that. I believe they are argumentative and in addition have been covered time and time again by other questions.

The Court: Sustained.

Q. (By Mr. Hughes): Mr. Wurnsted, I want to ask you: If you had been in the position of the Granite Falls Planing Mill, would you consider that you had received fair treatment if you had made an application, as they have made it, and received no reply until a year and two days later?

A. No, I would never have let myself get in that spot. If I was serious and if I had made an application, I certainly would have followed it up when all that was necessary was to come down from the tenth floor to the third. I made the offer to go out there.

Q. And they accepted it and tried to make a date for you to go out there? [221]

A. That is right. I couldn't go that time. Then I called back, as I said before, and he couldn't go—or something. He was sick or something; I don't know just what it was but I do know I made the call.

Q. But you didn't do anything about the application?

A. That is right; I don't deny that at all.

Q. You don't admit any laxity on your part at all? A. None whatsoever.

Q. You did promise and expect to visit the Granite Falls Planing Mill, didn't you?

(Testimony of William C. Wurnsted.)

A. That is right. I was doing that in an endeavor to help them. Don't forget the war was on.

Q. You said in your letter of May 5 that you never heard from the Granite Falls Planing Mill, is that correct? That is the letter returning the application.

A. Will you repeat your question, please?

Q. You say in your letter of May 5, that you never heard from the Granite Falls Planing Mill, is that a correct statement?

A. I don't see where I made it in the letter.

Mr. Hitchcock: I believe the letter is in evidence, and speaks for itself. If you desire some material from the letter, read it from the letter.

Q. (By Mr. Hughes): "Inasmuch as I never heard from you [222] regarding this matter?"

A. That is right.

Q. You did say that, didn't you?

A. That is right.

Q. (By Mr. Hughes): You also say in your letter that this 539 changes the requirements of Supplemental Service Regulation 27 to MPR 165?

A. Yes, sir.

Q. Is that a correct statement?

A. It changes it slightly.

Q. In what way?

A. In the first instance.

Q. Just point out the sections that are changed.

The Court: Mr. Hughes, I am sorry to interrupt you, but don't you think the Court can take that letter and take those Regulations and read it itself?

(Testimony of William C. Wurnsted.)

Mr. Hughes: I don't think your Honor could answer this question because he states in his letter as one of his excuses for doing anything that the qualifying requirements of 27 were changed by 539. I maintain there was absolutely no change in the qualifying requirements.

The Court: Don't you think that I am the judge of that and not the witness?

Mr. Hughes: I just want the witness to admit, himself, that that was a misstatement. I don't know how else I can do it.

Q. Do you know Charles H. Edwards?

A. Yes.

Q. He was a lumber investigator for the O.P.A. during 1944, wasn't he? [228] A. Yes.

Q. Did you discuss with him the application of the Granite Falls Planing Mill which is dated May 3, 1944, to operate under 539?

A. I don't think so, Mr. Hughes. I don't remember discussing the case with him at all.

Q. Specifically on or about October 26, 1944, didn't you tell him that this investigation of the Granite Falls Planing Mill should be dropped and you should forget about it—October 26, 1944?

A. I don't remember even discussing it with him.

Q. I though you said you did discuss it with him. A. I said I didn't discuss it with him.

Mr. Hitchcock: I would like to object to it. I believe the witness testified in his prior answer that he had not discussed it and therefore I object to this question.

(Testimony of William C. Wurnsted.)

Mr. Hughes: I am just trying to lay the proper foundation, your Honor, for impeachment of this witness.

Q. (By Mr. Hughes): Didn't you tell him substantially the same thing in November, 1944—that you should forget about it and this Granite Falls Planing Mill investigation should be dropped?

A. As I said before, I don't remember discussing it.

Mr. Hughes: If your Honor please, I wish to make an offer of proof, at this time. I understand your Honor sustained the objection to my question which I asked Mr. Wurnsted yesterday. So I will make the offer of proof now.

I offer to prove by this witness that if the Granite Falls Planing Mill had not planed this lumber, it would have cost each of the buyers mentioned in Plaintiff's Exhibit 2 more than it did. I understood your Honor to hold that that was not admissible and I would like to show that by this witness.

The Court: Is there any objection?

Mr. Hitchcock: Yes. I would object to that on the ground, first of all, that it would be based upon assumption and facts that are not within the province of this court. And has nothing to do with this case. It is based upon the assumption of what would have been the price had certain other facts, which were not true, been true. I believe it is pure supposition all the way through and is not a proper subject for examination at this time.

M. A. WYMAN

a witness called on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Hitchcock:

Q. State your name, please?

A. M. A. Wyman.

Q. You are the M. A. Wyman who is a defendant in this suit? A. Yes, sir.

Q. How long have you been connected with the lumber industry, Mr. Wyman?

A. Since 1909.

Q. In various capacities? A. Yes, sir.

Q. Were you connected with the lumber industry during 1944, from July until December?

A. Continuously since 1909.

Q. What lumber companies did you hold an interest in between July and December, 1944?

A. M. A. Wyman Lumber Company, the M. A. Wyman Mill Company, the Granite Falls Planing Mill, the Kesterson Box Company. I believe that is all. [247]

Q. Where was your office at that time?

A. My present address, 743 Henry Building.

Q. Where was the Wyman Mill Company located?

A. Out of Granite Falls, about a mile and a half.

Q. When did you incorporate or cause to have incorporated the Granite Falls Planing Mill?

A. I believe it was testified here yesterday—I wouldn't know the exact date.

(Testimony of M. A. Wyman.)

Q. That testimony was correct?

A. I would think it was probably in January, '45.

Q. '45 or '44? A. '44; I am sorry.

Q. At that time you were president, were you not? A. I believe I was.

Q. What kind of an operation was the Granite Falls Planing Mill?

A. Well, it operated as a planing mill.

Q. A custom mill? A. Yes.

Q. Where was it located?

A. It was located on the sawmill property of the M. A. Wyman Mill Company.

Q. You heard the testimony of Mr. Doran, did you not, with reference to the fact that he was superintendent of both operations at that time; was that correct? [248] A. That is correct.

Q. Did he work under your supervision?

A. I had nothing to do with the Granite Falls Planing Mill. I ran the sawmill.

Q. You were president of it, were you not?

A. Of the Granite Falls Planing Mill?

Q. Yes. A. Yes.

Q. You had nothing else to do with it?

A. No.

Q. Other than being president? A. No.

Q. You have had occasion, Mr. Wyman, to follow rather closely the lumber Regulations?

A. I would say as closely as humanly possible while the things that came under my jurisdiction.

(Testimony of M. A. Wyman.)

Q. You were generally familiar with RMPR 26, were you not?

A. Yes, I am more familiar with that than anything else.

Q. You were familiar with SSR-27, were you not, under 165?

A. Well, in a more or less general way.

Q. Generally familiar? A. Yes, sir.

Q. You were generally familiar with that 539, were you [249] not?

A. Just about the same as 27 and 165.

Q. How long has the M. A. Wyman Lumber Company been in existence? A. Since 1922.

Q. You are still interested in that company, are you not? A. Yes; I am a partner.

Cross-Examination

By Mr. Hughes:

Q. Mr. Wyman, what kind of business did the Granite Falls Planing Mill do in 1944?

A. I have testified that I am not too familiar with their operations. I had nothing whatever to do with it. I had enough headaches without that one. My son looked after that. I think he could probably testify to that better than I could.

Q. Have you any knowledge of what kind of work it did?

A. Yes; servicing lumber and some resawing.

Q. Did they do any other work besides planing—servicing lumber?

A. They loaded cars; they trucked the lumber, and handled the lumber.

(Testimony of M. A. Wyman.)

Q. Were you personally or the M. A. Wyman Lumber Company, or the M. A. Wyman Mill Company engaged in milling or servicing or planing lumber at any time between July 11, 1944, and December 22, 1944?

A. Are you asking me about the M. A. Wyman Lumber Company?

Q. M. A. Wyman Lumber Company, M. A. Wyman Mill Company, or you personally; were you engaged in any of those things?

A. No. [252]

Q. Did you or the Wyman Lumber Company, or the Wyman Mill Company ever sell milling services to anyone between July 11th, and December 22, 1944?

A. No, sir; nor at any other time.

Q. Who looked after the compliance of the OPA milling service regulations during 1944 affecting the Granite Falls Planing Mill?

A. My son.

Q. Looking at Exhibit 1 for identification, what do these exhibits—sales of what kind of lumber does Exhibit 1 cover?

A. My answer would be the same as to Mr. Hitchcock. This first one would be for rough, green lumber. I rather imagine, since these are the documents which the OPA got from our office, that they probably are all one and the same thing; that is, they all cover the same general—

Q. Yes.

A. I might say that the OPA—

Mr. Hitchcock: Pardon me, sir.

(Testimony of M. A. Wyman.)

I would like to object unless the witness knows as to the facts he is testifying about. He testified he wouldn't know without going over it. He now testifies that he rather imagines certain things.

The Court: Well, you don't want to go over every one of those documents.

The Witness: You don't want me to do that?

The Court: No. Mr. Wyman, as shown by Exhibit Number 1 that you have there, is that planed lumber?

The Witness: No; that is rough lumber.

The Court: All right. Go ahead.

Q. (By Mr. Hughes): Did you sell any surfaced lumber to any of those people mentioned in Exhibit "A" to the Complaint—which I assume is the same as Exhibit 1—did you sell any surfaced lumber to any of those people?

A. I know what you mean.

Q. I mean, do those invoices——

A. These invoices—if I am correct in assuming that the OPA have picked out only invoices for rough green lumber that was manufactured by the M. A. Wyman Mill Company—if I am correct in assuming that, I can answer that question.

Q. Yes. It is stipulated, Mr. Wyman that these are sales of rough green lumber.

A. I understand that. But it doesn't say whether they came from the M. A. Wyman Mill Company or somebody else. It could be bought from Vancouver or California.

(Testimony of M. A. Wyman.)

May I ask Mr. Hitchcock a question? [254]

Mr. Hughes: Yes.

The Witness: Are these all invoices covering lumber that originated at the M. A. Wyman Mill Company?

Mr. Hitchcock: If the Court please, I believe the stipulation speaks for itself. That is stipulated to.

The Witness: Oh, I didn't understand.

The Court: All right. Go ahead, Mr. Hughes.

Q. (By Mr. Hughes): Did you ever have anything to do with fixing the prices to be charged for the servicing made by the Granite Falls Planing Mill? A. No, sir.

Q. Did the OPA investigate these same charges during the latter part of 1944 and the first part of 1945?

A. The OPA sent an investigator to our office, I believe it was in July.

Q. What year?

A. 1944. And he was there continuously—I say continuously—off and on, until I would say about the middle of December; something on the period of four months.

Q. Did you cooperate with him?

A. Yes, sir. We gave him a private office and a desk and a telephone and everything he asked for—whether they were invoices, correspondence, or what they [255] might be.

Q. Who was that? A. Mr. Edwards.

(Testimony of M. A. Wyman.)

Q. Did you ask him, when he finished, if he found anything? A. Yes, I did.

Mr. Hitchcock: If the Court please, I would like to object to this line of testimony. This present case is not based upon that investigation and that evidence was excluded as was reported yesterday. I therefore don't think that it is material now.

By Mr. Wyman's own testimony, the period of time covered—our suit was based upon violations from July 11, 1944, to and including December 22nd, 1944. The investigator went in there in July, and remained four months. He was there while this investigation was going on. This suit is not based upon that investigation, and this examination is not proper.

The Witness: He was the only investigator in our office.

Mr. Hughes: I have asked Mr. Hitchcock for a copy of his report. He says he is not going to have Mr. Edwards or Mr. Stockdale or any of those investigators here. I just want the Court to understand the result, if the Court will permit it, of Mr. Edwards' investigation after four months in the office of [256] Mr. Wyman, and Mr. Wyman says he finished in December, 1944.

The Court: Do you have Mr. Edwards subpoena?

Mr. Hughes: I have Mr. Edwards subpoenaed.

The Court: Will he appear?

Mr. Hughes: I hope to have him.

The Court: All right. I will sustain the objection, then.

(Testimony of M. A. Wyman.)

Q. (By Mr. Hughes): Do you know Mr. Wurnsted, Mr. Wyman?

A. I have met Mr. Wurnsted.

Q. Merchandise specialist for the OPA during 1944.

A. I have met him.

Q. Did you discuss this Granite Falls planing matter with him at any time during 1944 or 1945?

A. No, I didn't discuss it with him. I heard Mr. Wurnsted's testimony yesterday, which I think is substantially correct. This took place over two years ago, but as I recall an application was made by my son for the Granite Falls Planing Mill to operate under the so-called service charges. I would have said that probably the next day after that letter was written and mailed Mr. Wurnsted came in the office, and made himself known to me, and said—he had a letter in his hand; [257] I don't know whether it was that letter or a letter he received from Mr. Gervais which was produced yesterday. He said he would have to ask some questions about the Granite Falls Planing Mill. I told him I didn't handle that and took him in and introduced him to my son.

Q. Did you introduce him to your son at that time?

A. Yes.

Q. Did you call up Mr. Wurnstead shortly after May 3rd, 1944, and offer to take him to the Granite Falls Planing Mill?

A. I did.

Q. What did he say?

A. Well, he couldn't get away that day. As I recall, I called him up one morning and said, "I

(Testimony of M. A. Wyman.)

am leaving for Granite Falls about 10:00 o'clock"—or it might have been 11:00 or 1:00 or some other time. "I understand from my son you would like to go up and look over the layout and if you want to go with me today, O.K." He couldn't go with me at that particular time. I was of the impression, in thinking it back over, that I called him a second time, but I am not positive about that.

I do know that I told him either in that phone conversation—or if there was a second phone conversation— [258] it apparently was going to be difficult for him to get together with us and go when we went, so he could go any time he wanted to, just so he let me know or some of us know when he was going so we could be sure the superintendent was there. That was about the extent of my conversation with Mr. Wurnsted, and phone conversations to the best of my memory.

Q. Did he ever tell you verbally or in any other way—in writing or otherwise—that Granite Falls Planing Mill could not operate under 539?

A. Not me, no sir.

Q. Or its application could not be granted?

A. No, sir.

Q. Or anything to indicate such?

A. No, sir.

Mr. Hughes: That is all.

Redirect Examination

By Mr. Hitchcock:

Q. Just one question, Mr. Wyman. Pursuant to the stipulation that you have entered into through

(Testimony of M. A. Wyman.)

your counsel, you were president between July and December, 1944, of the Granite Falls, were you not? A. I think that is correct.

Mr. Hitchcock: That is all.

(Witness excused.) [259]

The Court: Call your next witness.

Mr. Hitchcock: The Plaintiff rests.

Mr. Hughes: If the Court please, at this time I move the Court, on behalf of M. A. Wyman, M. A. Wyman Mill Company, and M. A. Wyman Lumber Company, to dismiss this case on the following grounds: First, that the Second Amended Complaint states a new cause of action commenced after the expiration of the one-year Statute of Limitations, as provided by the Emergency Price Control Act.

Second, that the evidence introduced by Plaintiff at the trial shows a new cause of action and constitutes a variance with the allegation of the Second Amended Complaint.

Third, failure to prove any violation of revised maximum price regulations as alleged.

Fourth, failure to connect M. A. Wyman with any violation of Revised Maximum Price Regulation 26.

Fifth, estoppel by plaintiff to prove any violation of Maximum Price Regulation 539, and a failure to connect M. A. Wyman with any violation of Maximum Price Regulation 539.

I don't think the Court will probably want to hear an extended discussion of the ground that the

(Testimony of M. A. Wyman.)

Second Amended Complaint changes the cause of action [260] and was commenced after the expiration of the Statute of Limitations.

The Court: No; we have been over that before.

Mr. Hughes: I believe the evidence introduced at the trial of this case has failed to prove M. A. Wyman has violated any regulation. The witnesses are too; and Mr. Rothfield's testimony, the most favorable view I can take of it is that all he knows is what is shown by those invoices, and by what he read in the record. But from his personal investigation he knew and admitted he knew nothing. Those invoices, he says in effect, are crooked; that M. A. Wyman was the one who did the work. He states that to be a fact without any basis for it, he says, except the fact that the invoice shows that this lumber was sold as green lumber and shipped to the Granite Falls Planing Mill; the Granite Falls Planing Mill did the planing and, as in accordance with those invoices, M. A. Wyman was the shipper and sent it on to the consignee.

Now, that in itself I think shows that they were carrying out the instructions of the buyer—that the prices set forth in 539 were charged for the planing. But he says that the gist of the action is that the Granite Falls Planing Mill charged prices under 539 without getting permission to do so. They have put, I think, a little different construction on 539 from what I think the Court will put, and I think it is different from what the average person familiar with the lumber business would put.

(Testimony of M. A. Wyman.)

539 provides that a custom mill may charge the prices put in here if it is a custom mill—if it does custom milling services. But it says you can't be in common ownership with the ownership of a saw-mill. But it goes on to say if you do not qualify as a custom mill, under the paragraph (a) I have just referred to, you may under certain conditions get authority to operate under this regulation.

The rules covering this are as follows: an application must be filed with the OPA Regional Office nearest the operation; the application must show four things—three things, and it as a fourth—any other information applicable you may wish to show.

Now, the application that was filed substantially complied with this rule. And it goes on to say further, "Special authorization under this paragraph will be granted where the application enables the Regional Office to make findings—first, that will result in the greater production of surface boards of the dimension of kiln-dried lumber, green, partially dry, rough [262] or in thickness over two inches. Will provide necessary milling services which cannot reasonably be supplied by producing mill or by custom mills under paragraph "A." Will not result in unnecessarily increasing the cost of finished lumber to the ultimate consumer."

Now, we qualified under all four of those provisions. The testimony of Mr. Rothfield is that he didn't investigate to find out whether it could qualify under that provision; and the same with Mr. Wurnsted. He didn't investigate to find out

(Testimony of M. A. Wyman.)

whether or not it could qualify under those provisions. So the Regional Office could have made findings which would have justified the Granite Falls Planing Mill to charge the prices fixed in 539. And there is nothing here to show to the contrary. So, on the last provision—"will not unduly increase the cost to the consumer of the finished lumber."

Your Honor can see if the Granite Falls Planing Mill had not done this planing, it would have had to be shipped to another mill in Everett, a distance of some fifteen miles, who could charge under 539 without getting permission, the full price here, and the buyer would have had to pay an additional charge of hauling; so the net result is that the buyer got this [263] lumber cheaper than it would have gotten it had the Granite Falls Planing Mill refused to plane the lumber.

But even assuming—if the Court can find even that the Granite Falls Planing Mill has done something it shouldn't have done—that is a violation of 539 and a violation of 26, which is what is charged. There certainly has been no attempt here to connect M. A. Wyman with the Granite Falls Planing Mill.

Now, they admit that Exhibit 1—the charges for the rough green lumber are correct. So that the only thing for this court to determine, it seems to me, is first whether the government is estopped after having had this application, which I maintain substantially complies with the rule—after having held this application for a year and two days, they then decide that they are not going to approve it; that is, in the meantime they claim that the Wyman

(Testimony of M. A. Wyman.)

Lumber Company, or the Granite Falls Planing Mill has violated a regulation which they could have told them right then, and even throughout the year of 1944—during this investigation they at no time told them anything about it. So I think, your Honor, the government is, the OPA is estopped from claiming any violation under the admitted facts under this case. But I don't believe in any event can the court find against M. A. Wyman merely because [264] he happened to be president of the company, especially when the evidence clearly shows that he had absolutely nothing to do with the fixing of the prices.

I have a brief in this case which I know—I believe, at least, is the law on trying to hold an officer of a corporation liable for the corporate acts. The general proposition is that an officer is not liable unless you can show that he had some active part in directing this work; and the fact that he was president of the company, the fact that he held any office in the company, as the courts have held, is not enough; you must go further and show that he had something to do with the operation of this company. I submit, your Honor, that there has been a complete failure of proof to connect M. A. Wyman, and he is the only defendant in this case.

The Court: Motion denied. Call your first witness.

Mr. Hughes: Mr. Wyman.

Testimony on Behalf of Defendants

M. A. WYMAN

a witness called on behalf of defendants, having been [265] previously duly sworn, testified as follows:

Direct Examination

By Mr. Hughes:

Q. Will you tell the Court briefly the set-up of the Granite Falls Planing Mill and what kind of work they did; tell the Court how it first originated and something about it.

A. There is always a reason for all of these things. I would like to explain to the court—this little sawmill was started in 1942, as a sort of a wood lot mill. By that I mean we operated in a logged-over territory on low-grade logs, which under OPA ceiling prices could not be brought into market on account of the low price and the high cost of logging and trucking—transportation. We started this mill——

Q. Are you speaking of the sawmill?

A. We started the sawmill in about September or October, 1942. It ran three or four months that year. We lost about eight thousand dollars. We tried to figure [267] out why and where we lost the money and we concluded—the only conclusion we could arrive at at that time was that we had a scaler—a grader and scaler who was not competent and who was giving the people from whom we

(Testimony of M. A. Wyman.)

bought the logs a little the best of it. So we corrected that situation and started out in '43 and ran the entire year of '43 before taking a—stopping and taking an inventory and a check to see how we were getting along, as we rather thought we were getting along fairly good.

December 1, '43, when we *been* an association scaler on the lake and scaled the logs in the pond, and closed our books, we found we had lost \$24,000 in 1943. We called in Mr. Doran, who was on the stand yesterday. We all got around the table and tried to figure out where we had lost the money. We discovered that it was costing us altogether too much money to plane the lumber. I think it was taking eight or nine men. So at that time the lumber market was very active. We could then sell all the lumber we could make rough just as easy as we could make surfaced and a great deal more than we could possibly make and ship rough. So I said, "Well, the answer is very simple as far as I am concerned. We shut the planing mill down and operate as a rough mill." And [268] that is what we did. From there on the M. A. Wyman Lumber Company operated as a rough mill. I would say a week or two after we had arrived at that decision and were taking orders—proceeded to take orders for rough lumber, my son called me one Sunday afternoon and he said—

Q. That is M. H.?

A. My son, "M. H." He said, "As you

(Testimony of M. A. Wyman.)

know, there is a new OPA Regulation out which permits charging for surfacing lumber." He says, "Now, it seems to me as though it is a shame for us to require our customers to take this rough lumber, and take it to Everett or Tacoma and have the lumber surfaced. It would cost them transportation costs"—I might explain that we are not located on a railroad either. We are between seven and eight miles from a railroad and we are about twenty miles from Everett. It has been testified here several times as to the distances, but it is about twenty miles—I think about twenty-two miles.

He says, "We do this: We make application under this OPA service charge, and we could perform this service for our customers cheaper than they could have it done elsewhere." I said to him, "Well, Sonny, I am just perfectly happy the way I am running this mill as a rough mill. As far as I am concerned, that [269] is the way I want to run it. If this can be done and it will be of advantage to our customers and not cost them any more and possibly save them some money, it is perfectly all right with me, but I just don't want to have anything to do with it, because I have enough things to do as it is, and I just don't want any more."

Now, that is the background.

(Testimony of M. A. Wyman.)

Cross-Examination

By Mr. Hitchcock:

Q. And you obeyed all regulations at that time, did you not?

A. The OPA had been through us with a fine-toothed comb. They didn't find anything wrong.

Q. So you did charge your customers for surfaced lumber in 1943, did you not?

A. That is correct. We shut the planer down in 1944, and never planed the lumber thereafter.

Q. With reference to the year 1943, I believe you stated that your operation at that time showed a loss? [271]

A. About \$24,000.00.

Q. When did you ascertain that loss?

A. At the close of the year.

Q. When did you have this meeting that you speak of?

A. The early part of January; as soon as we got our figures in.

Q. You decided at that time, I believe, that you would operate better as a rough mill, is that right?

A. That is correct. We just couldn't afford to surface the lumber. We were losing too much money. That is where the money was being lost.

Q. How did you expect to correct that situation?

A. Shut the planer down, and operate as a rough mill, which is what we did.

Q. When did you arrive at that decision?

A. The early part of January; just as soon as we got our figures in and found out what had happened.

(Testimony of M. A. Wyman.)

Q. (By M. Hitchcock): Immediately after the formation of the corporation, that is the Granite Falls Planing Mill, you started charging increased rates for surfacing, is that correct?

A. No, sir; that is not correct. As far as M. A. Wyman and the M. A. Wyman Lumber Company are concerned, I understand we are the only defendants in this case. They have sold nothing that originated at that mill except rough lumber.

Q. That rough lumber was surfaced then in the Granite [273] Falls Planing Mill, wasn't it?

A. I wouldn't say it all was. I think our customers had the choice of having that surfaced wherever they pleased. They could take it to any milling plant they wanted to and I believe some of it was done elsewhere. I am not just sure about that.

Q. With reference to the transactions in this suit between July and December, 1944, wasn't all of that lumber surfaced in the Granite Falls—none of that was taken to other customers?

A. Do you mean all of the lumber that was produced in that mill?

Q. All of the lumber as shown by these transactions in our exhibits; all of that was surfaced by the Granite Falls, was it not?

A. I wouldn't say so, no.

Mr. Hughes: Which exhibit is that?

Mr. Hitchcock: Exhibit 1.

A. (Continuing): I would say for your information and the information of the Court that dur-

(Testimony of M. A. Wyman.)

ing that period we did ship some rough lumber. There were cars that went out of there rough that were never surfaced. I haven't gone over the papers there but we were shipping rough timbers there all of the time, off and on. [274]

Q. (By Mr. Hitchcock): With reference to the customers who desired surfaced lumber, that was surfaced in the Granite Falls, wasn't it?

A. I wouldn't say that. They weren't compelled to have it surfaced in the Granite Falls Planing Mill. They could have it surfaced any place they wanted it done. Many of them were located at a distance. I know some of them we sent to planing mills and they would resaw the boards and surface them.

M. H. WYMAN

a witness called on behalf of defendants, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Hughes:

Q. You are M. H. Wyman?

A. That is right.

Q. And you are the son of M. A. Wyman?

A. That is right.

Q. Who looked after the business of the Granite Falls Planing Mill during 1944, Mr. Wyman?

A. I did.

Q. And your father was president during that time?

A. That is right.

(Testimony of M. H. Wyman.)

Q. Was he president at any time during the year 1945?

A. No. The officers were changed as of the first of January, '45.

Q. Did your father have any interest in the Granite Falls Planing Mill after that?

A. No, sir.

Q. You held an office in the Granite Falls Planing Mill, did you not?

A. Yes; I held the office of Secretary-Treasurer.

Q. You were served with a summons and complaint in this case when—do you remember the date?

A. No, I don't.

Q. December 3, I think the record shows. Was that the first time you were served in this case?

A. Yes.

Q. What kind of business did the Granite Falls Planing Mill do in July, 1944?

A. It received lumber, surfaced lumber, broke down lumber.

Q. That is all planing lumber, is that right?

A. That is right.

Q. Did it do anything else besides planing lumber? [277]

A. Yes. It hauled the lumber some seven miles to the railroad where it had facilities to load.

Q. Did Granite Falls Planing Mill sell any lumber during 1944?

A. Granite Falls Planing Mill never owned any lumber.

Q. They never sold it? A. No.

(Testimony of M. H. Wyman.)

Q. They just sold planing services, is that true?

A. That is true.

Q. And that is located at Granite Falls, Washington?

A. That is right.

Q. Were you or your father, the Wyman Lumber Company, or Wyman Mill Company, ever engaged in milling lumber or planing lumber at any time from July 11, 1944, to December 22, 1944?

A. I didn't understand.

Q. I say: Were you or your father or the M. A. Wyman Lumber Company or the Wyman Mill Company engaged in planing any lumber and milling lumber at any time from July 11, 1944, to December 22, 1944?

A. Not as individuals, no—no.

Q. Not as individuals; not under the names that I have just specified?

A. No.

Q. Did you or your father, M. A. Wyman, or the Wyman Lumber [278] Company, or the Wyman Mill Company, ever sell milling services to anyone during that period?

A. No.

Q. Who looked after the O.P.A. milling services—the service regulations during 1944 affecting the Granite Falls Planing Mill?

A. I did.

Q. Who fixed the charges for the service under 539?

A. I did.

Q. Did you study these regulations as they came out, Mr. Wyman?

A. Yes, I did.

Q. What effort did you make, will you tell the Court, to comply with these regulations as they came out from time to time affecting the planer?

(Testimony of M. H. Wyman.)

A. The regulations were changed several times during the period that the Granite Falls Planing Mill operated. When the corporation was originally set up, the Regulation MPR 165 was in effect.

Q. MPR 165 was in effect at the time you organized the corporation in 1944?

A. That is right. The corporation was organized in the latter part of January, 1944.

Q. What regulation was in effect at that time?

A. I believe MPR 165. [279]

Q. Did Granite Falls Planing Mill comply at all times with that Regulation, as far as you know?

A. Yes, they did.

Q. When did the first change in that Regulation come out? A. In——

Q. Pardon me? A. Yes.

Q. 165 fixed the price for planing lumber, did it?

A. No, it didn't; not in a dollars-and-cents figure. The Regulation at that time said that if the operation was not in business in March of '42, they would charge the price of their nearest competitor.

Q. That is right. Who was your nearest competitor?

A. I believe Walton Lumber Company in Everett was our nearest competitor at that time.

Q. How far is that from the Granite Falls Planing Mill? A. About 20 miles.

Q. Did you use the price of the Walton Lumber Company at the planing mill?

A. Theirs or a little less.

(Testimony of M. H. Wyman.)

Q. Theirs or a little less?

A. Ours was possibly a little less.

Q. These charges in this Complaint that you have read, were they investigated by the OPA during 1944?

A. Yes, they were. [280]

Q. By whom?

A. By Mr. Edwards.

Q. How long was he there?

A. He was in the office in Seattle, oh, off and on from four or five months.

Q. In the office there, of the M. A. Wyman Lumber Company?

A. That is correct.

Q. Where did you attend to the business of the Granite Falls Planing Mill?

A. I had my office in Seattle. The planing mill's address was Granite Falls where they kept their bank account and all payments came to Granite Falls.

Q. The Mr. Edwards you speak of was an OPA investigator at that time?

A. That is right.

Q. Did you cooperate with him?

A. Yes, we did. We gave him all of the information he asked for.

Q. And he finished his investigation when?

A. I am not sure of the date; it was the latter part of '45.

Q. '45?

A. '44; pardon me.

Q. (By Mr. Hughes): Who else investigated the Granite Falls Planing Mill during 1944—'45?

A. There was nobody else in our office at that time except for Mr. Stockdale who followed Mr. Edwards and came up and asked for certain infor-

(Testimony of M. H. Wyman.)

mation to take out of the office with him. He never spent—I don't believe he spent any time in our office.

Q. Did you give him the information?

A. We did, yes.

Q. Who succeeded him as investigator?

A. Well, there was a Mr. Foster in our office once or twice.

Q. Did you furnish him with all of these invoices? A. I did.

Q. And of which photostatic copies have been made; you furnished them?

A. That is right. [282]

Q. That was both of the business of the M. A. Wyman Lumber Company, and the Granite Falls Planing Mill? A. That is right.

Q. Did the Granite Falls Planing Mill make an application to the Regional Office of the OPA to operate under 539? A. No, they did not.

Q. Did it make an application on May 3rd to operate under supplementary Order 27 to 165?

A. Yes.

Q. And that was effective?

A. I believe it was effective on May 3rd, '44.

Q. Prior to that, it was under 165?

A. Prior to that there was no Regulation requiring an application to be made.

Q. What did you do with this application?

A. The application was made to the Regional Office of the OPA and addressed to the White-Henry-Stuart Building, here at Seattle.

(Testimony of M. H. Wyman.)

Q. Handing you Defendants' Exhibit A-2 for identification, I will ask you if that is the application which you mailed?

A. Yes; I signed that.

Q. What became of that; what did you hear from that application? [283]

A. We heard nothing from it—in regard to this application, we heard nothing from the OPA.

Q. Did you talk to someone?

A. I did talk to Mr. Wurnsted and discussed going up to the physical properties.

Q. What was said at that time?

A. As I remember it, my father brought Mr. Wurnsted in and asked me to give him what information he wanted. I knew more about the planing mill, to tell him what he wanted to know. We sat down. The essence of the discussion was making an arrangement to go up together and for him to view the properties of the planing mill at Granite Falls.

Q. What did you understand the purpose of viewing the property was?

A. Of course, my impression was whether he was going to act on the application we had made.

Q. Did he give you an impression of whether he would or not?

A. No. He gave no indication at that time.

Q. What did he say he wanted to see the mill for?

A. Merely to look over the physical setup of the property.

(Testimony of M. H. Wyman.)

Q. Did he indicate the purpose was to let you know whether or not your application would be approved?

A. That was the understanding I gathered for the reason [284] for going up to the property.

Q. Did you talk to him again about going up?

A. Yes. I called him once or twice and told him when I was going and asked him if he would care to go up with me.

Q. What did he say?

A. We didn't get together; rather, he had something else to do or when he called me I believe once I had something else to do.

Q. Did he say he would call you when he was ready; did he indicate that he would go any further?

A. I presumed that the reason he was going up was to act on our application. I figured he would find a way of getting up there.

Q. Did you hear anything from him after—that was in May, did you say, 1944?

A. I think that is right.

Q. Did you hear anything from him later on?

A. We heard nothing—after these phone conversations, we heard nothing more about the application.

Q. I will ask you if that application was made under the provisions of Supplementary Order 27 to 165.

A. That is right.

Q. Did it comply substantially with the requirements of an application? [295]

(Testimony of M. H. Wyman.)

A. That is why I wrote—endeavoring to cover the points that were brought out in the——

Q. Did Mr. Wurnsted tell you at any time it did not comply before sending you this letter?

A. No, he did not.

Q. Handing you Exhibit 3, did you receive a letter from Mr. Wurnsted on or about May 5, 1945?

A. I did.

Q. Was that the first time you heard from him after you talked to him? A. That is right.

Q. In the meantime, you were operating under 539? A. That is right.

Q. 539 superseded 27 on June 5, 1944?

A. That is right.

Q. That Regulation 539 was issued on June 5, and was effective the same day, is that right?

A. Yes.

Q. Mr. Wyman, why did you operate under 539 from July 11th to December 22nd?

A. The application I had made under MPR 165, Supplemental Servicing Regulation 27, the information required in the application was identical to the information required in the application to be made under 539. I had made my application under 165, and had had no [286] answer from it.

Q. And so what?

A. So I could see no point in copying the same letter and putting 539 at the top of it instead of 165.

Q. In that letter you got from Mr. Wurnsted, he says—speaking of 539—“This new regulation on

(Testimony of M. H. Wyman.)

custom milling changed the qualifying requirements of Supplementary Order 27." Did it change its qualifying requirements? A. No, it did not.

Q. Have you examined the two regulations?

A. Yes, I have.

Q. Are they the same?

A. So far as I can tell, they are identical in wording.

Q. Did Mr. Wurnsted tell you why he wanted to see the planing mill—why he wanted to see the setup personally?

A. I don't know whether that was brought out or not. I presumed all of the time that it was in regard to our application which had been made.

Q. Does 539 contain any provision that no sale under the Regulation may be made until permission received from the OPA?

A. No, it doesn't.

Q. Do you know whether MPR 165 fixed the time in which [287] an application for a change of price must be accepted or rejected?

A. I believe it is ten days.

Q. Ten days? A. The application.

Mr. Hitchcock: I object to that question and answer as calling for a conclusion. The Regulation referred to is MPR 165. The Regulation involved, if the Court please, is SSR-27, under 165, which is different. That was brought out, I believe, in Mr. Wurnsted's examination.

The Court: The Court will read those. Go ahead.

(Testimony of M. H. Wyman.)

Q. (By Mr. Hughes): Supplementary Order 27 to 165, I believe, provides in substance that if a planing mill is owned or controlled by a sawmill, that the same operation is made—where the same operation of selling lumber and planing lumber is made—that even though that is present, that you can still get permission from the OPA to operate under 539?

A. An application may be made.

Mr. Hitchcock: I object to the question as leading, if the Court please.

The Court: It is leading but he may answer.

Mr. Hughes: I have been trying to save time.

The Witness: The way I understand the Regulation, supplementary 27 to 165 says that a custom mill, if there is an interlocking ownership or financial interest, then under those conditions must make application; if there is not, then they automatically have a license to operate.

Q. (By Mr. Hughes): It goes further than that, doesn't it, and says that if the OPA can find certain things true, why, permission will be granted.

A. That is true.

Q. Were those things true or not true with the Granite Falls Planing Mill?

Mr. Hitchcock: I object to that, if the Court please, as being a conclusion.

Mr. Hughes: I want to show, if the Court please, that the application would have been granted if Mr. Wurnsted had taken it up and done as he should have done, because we qualified in every

(Testimony of M. H. Wyman.)

particular as set out in 539; and the OPA would find that we came under the provisions provided by 27 of 539.

I think, your Honor, it is material——

Mr. Hitchcock: It is based upon supposition, if the Court please.

Mr. Hughes: ——to show at least good faith.

The Court: Overruled. Go ahead.

A. I believe that is brought out in my letter of application to the Regional Office where I bring out the fact that there are many rough mills. There are thirty or forty rough mills within a 20-mile area up there, or more—small mills whose—well, they are making ties for the railroads say, and they have lots of pieces that can be worked up—if they had the facilities—to go into the lumber market and lumber channels which in most cases are waste unless they are salvaged and put into a plant that has facilities to work them up. I bring that out in my letter of application.

Q. (By Mr. Hughes): In other words, as I understand it, the OPA, if they had followed this up, would necessarily have found that you could qualify under this Regulation 539?

A. If I hadn't thought so, I would have continued to operate the planing mill.

Q. Did the Granite Falls Planing Mill confine its planing to lumber from the Wyman Lumber Company?

A. No; no, they did not. There was considerable

(Testimony of M. H. Wyman.)

lumber that was bought and brought in from these small mills that went through the Granite Falls Planing Mill.

Mr. Hughes: I will ask this question and [290] then I will be through with the witness.

Q. (By Mr. Hughes): If this planing had been done by the Walton Lumber Company, which is your nearest competitor, would it have cost the buyer more or less?

Mr. Hitchcock: I will object to that.

The Court: The Court has excluded that heretofore, but seeing now that it—as the defendants contend—has become material, the objection is overruled. You may answer. This is in support of those requirements in the Regulation?

Mr. Hughes: Yes.

The Court: You may answer.

A. If the lumber had been sold rough—any lumber from any mill—it has to go to a custom mill to be surfaced for several reasons. If the customer is in Iowa or Chicago or some place else, unless he has it done on the West Coast, he has got to pay freight on the rough lumber which is considerably more than it would be on surfaced lumber, so it has to be done some place on the west coast. There are numerous custom mills in Western Washington and Oregon. Some customers do business with one and some customers do business with others. It would have to go to one of them to be custom milled, and it would either have to be [291] trucked

(Testimony of M. H. Wyman.)

or shipped by rail at a considerable freight charge.

Q. (By Mr. Hughes): Would it have cost them more?

A. Yes; by the amount of freight it would go into and, as I said, in most cases we charged less than the MPR 539 maximum prices. It would have cost them full MPR 539 plus the freight into their custom milling plant.

Mr. Hughes: I think that is all.

Cross-Examination

By Mr. Hitchcock:

Q. Mr. Wyman, at the time that you were connected with Granite Falls, you were thoroughly familiar with Supplementary Service Regulation 27? A. I read it a good many times.

Q. You read it especially with a view to the application that you filed, did you not?

A. That is right.

Q. Let me understand the situation with respect to that application; is it your understanding at that time that in the event that a planing mill and an ordinary sawmill or any other lumber operation, under joint ownership or control, that it was necessary, before [292] the planing mill could plane or surface lumber, to secure an authorization from the OPA?

A. I don't believe it states that. I believe it says where there is an interesting ownership or joint control, an application may be made.

Q. Doesn't it say, as a matter of fact, in para-

(Testimony of M. H. Wyman.)

graph 3, Section 2, that it “does not own or control and is not owned or controlled by and is not under common control of the mill producing specie 26—and so on?

A. That is the definition of a custom mill.

Q. Then it goes on and states, “If you do not qualify as a cusotrm mill under paragraph “A”—which is the one that states that a custom mill is the one that performs custom services—“under certain conditions you may get authority to operate,” isn’t that right? A. That is right.

Q. And you, of course, filed under these special conditions because of the fact that your father was president and also in the Wyman Mill Company, is that correct? A. That is correct.

Q. You are thoroughly familiar, I presume, and went over the application carefully as to what that application should contain? A. I did.

Q. What should it contain?

A. It should show how granting the license would gather up more lumber for the war effort—

Mr. Hughes: Well, here it is in the Regulation. I wouldn’t think that the witness would be required to memorize what is covered by the Regulation.

The Court: Make your objection and the Court will rule.

Mr. Hughes: He has asked that the witness what are the qualifications. There are quite a number in the Regulation and I don’t think that the witness should be bound to know each one of those four different requirements because they are

(Testimony of M. H. Wyman.)

in fine print and I think, if he had the Regulation before, he could——

The Court: Can you answer the question without the Regulation before you?

The Witness: I think I can answer most of the Regulations.

The Court: If you can't take the Regulation.

A. (Continuing): The application must show the location of the plant; it must show the equipment—what it can do and how much equipment it has—how much capacity it has; it must show it is going to help to get more lumber; what the granting of the application is going to accomplish for the war effort. [294]

Q. (By Mr. Hitchcock): Were there any other requirements about cost?

A. I don't remember.

Mr. Hughes: Costs to the buyer?

The Witness: I don't remember.

Q. (By Mr. Hitchcock): As a matter of fact, to refresh your recollection, Mr. Wyman, I presume you read these carefully before you filed the application?

A. That is true. That was two years ago.

Q. As a matter of fact, doesn't paragraph 2 state that the extent of ownership or control of or by any other operations relating to forest products or common ownership or control, giving name, location, and the nature of the other operation, is one of those qualifications? A. I believe it is.

Q. That is necessary, isn't it?

A. That is right.

(Testimony of M. H. Wyman.)

Q. I will ask you to refresh your recollection from Defendants' Exhibit A-2, and tell the Court if that states anything in there with reference to ownership at all.

A. No, it does not. I neglected to put that in.

Q. You neglected to put that in, but you knew it should [295] be in at the time you made that out, is that correct?

A. I was working under a deadline then. When that letter was written, it was the date the Regulation became effective and I had to get it in the mail that day and I wrote it out very hurriedly.

Q. I thought you testified you went over the Regulation thoroughly.

A. I did read the Regulation. I had to, to make the application.

Mr. Hitchcock: That is all.

Redirect Examination

By Mr. Hughes:

Q. Did Mr. Wurnsted tell you that your application was faulty; at any time did you hear from him?

A. No, I did not.

Mr. Hughes: Mr. Edwards.

Mr. Hitchcock: Before this witness takes the stand, I should like to object in toto to any evidence he might give in this base based upon the fact that none of our present case is based upon any investigation by Mr. Edwards. However, in the event the [296] Court desires to hear the testimony of Mr. Edwards, relative to the investigation

(Testimony of M. H. Wyman.)

he did make, we are willing on behalf of the agency to have that testimony taken with the understanding that we may be permitted to go into other phases of the transactions that were examined; in other words, to show what facts, if any, were brought out by his investigation as to other matters that he was on at that time.

The Court: I don't know why he is called. Go ahead and proceed.

CHARLES H. EDWARDS

a witness called on behalf of Defendants, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Hughes:

Q. Are you Mr. Charles H. Edwards?

A. I am.

Q. Mr. Edwards, were you employed by the OPA as an investigator during 1944?

A. I was.

Q. A lumber investigator, were you?

A. Yes.

Q. Were you ever in the lumber business?

A. Before that?

Q. Yes? A. Yes.

Q. For how long?

A. Well, for practically forty years.

Q. Forty years? A. Give or take.

(Testimony of Charles H. Edwards.)

Q. When did you first begin to work with the OPA here in Seattle?

A. It was approximately—I think it was the 10th of January, 1943.

Q. Did you investigate M. A. Wyman or the Granite Falls Planing Mill during 1944?

A. I did.

Q. Was that investigation for a violation of 539?

A. Yes.

Q. Do you remember?

A. Yes.

Q. Did you, in the course of that investigation, talk to Mr. Wurnsted during the year 1944, concerning 539 and the Granite Falls Planing Mill?

A. Yes; I talked to him possibly you might say, more on the matter of 165 and SS-27, which was superseded by 539.

Q. Did you discuss the application made by the Granite [298] Falls Planing Mill to the OPA, dated May 3, 1944?

A. I did.

Q. What was said by Mr. Wurnsted at that time concerning that investigation?

A. When I was checking these files, and I was formed that they had made an application, I went in to Mr. Wurnsted's office to investigate and locate this application. I found the application was there; and it had been there for a considerable period of time—several months probably. It would be longer than several months. As I remember, it was made about in May, and I think I went in about the 26th of October.

(Testimony of Charles H. Edwards.)

Q. The 26th of October?

A. Of 1944. And the application, to my best recollection, was still in his office.

Q. In whose office?

A. Mr. Wurnsted's office.

Q. What was said; have you got any notes as to what was said by Mr. Wurnsted; did you keep a diary?

A. Yes, I kept a diary.

Q. You kept a diary of some of the more important events, you thought, at that time?

A. Yes.

Q. Have you any record of any conversation with Mr. Wurnsted concerning this application?

Mr. Hitchcock: I object, if the Court please, to this line of questioning. I don't think it is material to this case.

Mr. Hughes: I think, your Honor, Mr. Wurnsted's statement here would give the Court the impression that he was against the operation of the Granite Falls Planing Mill as it operated. But his statement to Mr. Edwards shows entirely different. I just want to show by this witness that Mr. Wurnsted told Mr. Edwards on October 26, 1944, and also in November, 1944, that this investigation should be dropped and he should forget about it, or words to that effect. He said that he had had this application for several months, and nothing had been done with it.

Now, I asked him the question pointblank if he had made such a statement, and he said no. He said he didn't remember. He said he didn't remember

(Testimony of Charles H. Edwards.)

making it,—he didn't say no. I called this witness to show that he did make those statements.

The Court: Well, I don't see that it makes any difference whether he did or did not. But I remember you did ask him that question and I think it was without objection and he answered. So you may answer the question.

The Witness: May I read from my notes, Mr. [300] Hughes?

Mr. Hughes: Yes.

Q. (By Mr. Hughes): What do your notes show? A. On the 26th of October——

Q. What year?

A. 1944, "Wyman case continued. I checked with Wurnsted on number 165 application and found it still on his desk waiting for a visit to the Granite Falls Planing Mill. Mr. Wurnsted suggested we drop previous violations on non-compliance and start over from scratch." My record shows "I doubt is J. S. B."—who was Jerome S. Bishop—"will O. K. this."

Q. Who was Jerome S. Bishop?

A. At that time he was the chief of the lumber investigating headquarters at Portland.

Q. You mentioned 165; did that refer to Regulation 165?

A. That is Regulation 165 and SS-27.

Q. Did you have any other talk with Mr. Wurnsted about this application?

A. Well, yes. I talked to him at various times over a number of matters. I have a record here going into——

(Testimony of Charles H. Edwards.)

Mr. Hitchcock: I will object to those questions and answers.

The Court: Wait just a minute. [301]

A record going into what?

The Witness: A conversation with Mr. Wurnsted regarding this same case.

The Court: You asked Mr. Wurnsted about one case.

Mr. Hughes: I asked him, also, if he made a similar statement in November, 1944. He said he didn't recollect.

The Court: I don't see what difference it makes about what conversations the two men may have had in the office.

Mr. Hughes: I did it for the purpose of showing the good faith of Mr. Wurnsted, your Honor. He has made some statements here that would indicate to the Court——

The Court: You may go ahead. Objection overruled.

A. (Continuing): "On November 18, 1944, the Wyman case, Mr. Wurnsted said to me that he felt all firms prior to '43 are in violation of MPR 165 because there was no permission prior to that date to operate."

Q. (By Mr. Hughes): Did he indicate whether he was doing anything with those?

A. No. [302]

Redirect Examination

By Mr. Hughes:

Q. Did Mr. Wyman give you cooperation in your investigation? A. Thoroughly.

(Testimony of Charles H. Edwards.)

Q. And you were there for some time, you say?

A. I was there for a considerable period of time and I was treated very nicely by everybody in the office.

Q. And you had access to all of the records?

A. All of the records.

Q. You had an office and a telephone?

A. I did. I was offered a private office with a telephone and I had access to all of the records and any stenographic service I might require. [305]

The Court: Is that all of the evidence?

Mr. Hughes: That is all.

Mr. Hitchcock: That is all. [308]

The Court: The record may show that the case is submitted. The Court will take it under advisement and will rule upon it Monday at 10:00 o'clock.

Mr. Hughes: Your Honor doesn't wish any argument?

The Court: No. [309]

The Court: In the case of Paul A. Porter vs. M. A. Wyman, take an order for a judgment in favor of the Plaintiff and against the defendants for single damages in the sum of \$19,130.67. That is the amount as shown by your exhibit "A." Is that the proper amount of single damages?

Mr. Hitchcock: That is the proper amount, sir.

The Court: Very well; single damages, only. I will say, Mr. Hughes, that if the Court could, it would render a judgment for a less amount of damages.

Mr. Hughes: May I ask your Honor what disposition was made of Count 1, the Injunction Count?

The Court: That mill has been sold and disposed of. Do you insist on an injunction?

Mr. Hitchcock: I will leave that matter entirely up to the Court. The facts are true,—the mill has been sold and disposed of. However, M. A. Wyman is still in the lumber business, the defendant, but I will leave that entirely up to the Court. [311]

Mr. Hughes: There is nothing in the Complaint—there is no attempt to prove that they have ever tried to violate since December 20th. There is no showing that they have ever threatened to violate and, as I understand the purpose of an injunction, it is to restrain and not to punish.

The Court: I doubt if it makes any difference to the Government whether there is any relief granted in that matter. That is Count 1, isn't it?

Mr. Hughes: That is correct.

The Court: Well, that relief is denied. Just enter a judgment in the amount that I mentioned.

Mr. Hughes: I would like to ask the Court to fix the amount of the supersedeas in the case of appeal; I would appreciate it. Your Honor will be away. I would like also to have permission to present to Judge Bowen or Judge Black the approval of the supersedeas bond so it won't be necessary.

The Court: That will be all right. What is the Statute,—in equal amount?

Mr. Hughes: I will say that heretofore the Court

has been putting it at just about the same amount. Of course, an appeal bond has to be in the sum of \$250.00 to cover the costs. So I would say the amount of the judgment,—and of course, we have to [312] have a cost bond, too.

Mr. Hitchcock: Cost, that is correct.

Mr. Hughes: So that would be \$250.00 more.

Mr. Hitchcock: That is entirely satisfactory, your Honor.

The Court: All right. Set the supersedeas bond in the sum of \$20,000.00. That will avoid the odd figures.

Cost bond in the sum of \$250.00.

Mr. Hughes: Your Honor, may the record show that Judge Bowen may approve the bond and sign such Orders as are necessary to carry out the Appeal?

The Court: The record may show that any Judge of the Western District of the State of Washington may approve the Supersedeas, the Appeal Bond, and to sign any other Orders necessary in the perfecting of the appeal.

Mr. Ogden: If your Honor please, there is just one other thing and that is how this judgment should run, insofar as the Defendant Edward Doran is concerned. He has been dismissed, as an individual. But does the judgment run against the individual? That is the same problem we have had from the beginning.

The Court: Judge Bowen made a very clear order dismissing these defendants, as individuals,

[313] but holding them as to partnership liability, which means—as I take it—that they were sued as partners; in other words, the two partners doing business as, this title—so it is a partnership liability. It can't be anything else.

Mr. Hughes: May I ask one further question? Then against whom will the judgment run?

The Court: The defendants in the Complaint who have not been dismissed. [314]

The Court: What if any objection do you have to Plaintiffs' submitted findings?

Mr. Hughes: Well, I have some objections, your Honor, to them. I would add in that other matter we have just finished, if your Honor would like to have security, I would be glad to put up any security the Court would suggest if your Honor would let this matter go over until a new trial is heard.

The Court: No; I will settle findings now. We can do that now.

Mr. Hughes: I object to paragraph 6. It says: "Defendants made numerous sales of Douglas fir and other West Coast surfaced lumber between July 11, 1944, to and including December 22, 1944, * * *"

Now, your Honor, there is nothing in the record to show that the Defendants made any sales of surfaced lumber. If your Honor will remember the stipulation that was agreed upon between the Plaintiff and Defendant, first we agree that this is a penal action and that these regulations,—539 is a Service

regulation covering service charging and 26 is a commodity regulation establishing maximum prices for the sale of lumber.

And the stipulation further provides that the "M. A. Wyman Lumber Company sold, shipped, invoiced and received payment for 3,122,732 feet board measure of Rough Lumber from July 10, 1944, to and including December 22, 1944. That these figures were obtained from invoices the originals of which are now within the possession of the Defendants herein, * * *."

And the stipulation further says: "That it received payment for this lumber in the sum of \$89,-427.38. That said latter sum is in accordance with the prices set forth in RMPR 26."

So there can be no dispute as to the rough lumber.

Now the invoices do not show that M. A. Wyman [322] or any of these Defendants at any time surfaced any lumber. The only testimony I think on that question was given by Mr. Rothfield who stated that he had not investigated and all he knew was what was shown by those invoices and what he could find out from others.

What he could find out from others of course is hearsay and invoices themselves show that there was no surfaced lumber sold by any of the Defendants.

The Defendants sold rough green lumber. The customer says, "Send this rough green lumber to the Granite Falls Planing Mills. Have them plane the lumber for me and then ship it to me."

But none of these Defendants—there is no evi-

dence, your Honor, showing that any of these Defendants ever sold any surfaced lumber.

The Court: All right. Your objection to paragraph 6 is overruled. What is your next?

Mr. Hughes: On paragraph XI, I don't believe that he has set out enough in paragraph XI that the Court can understand from the finding there that the conduct of the O.P.A. amounted to an estoppel and they had this application for a period of a year and did nothing whatsoever with it and then finally, believing in the meantime at least that they were violating the regulation at that time, waited until after the violation ceased and then [323] notified them that the application did not meet the requirements. I say I think I am entitled to more information as setting out those facts that I have just related.

The Court: Your objection to paragraph XI is overruled.

Mr. Hughes: Now as to paragraph XII, he says in the last sentence thereof: "The Granite Falls Planing Mill never filed any other application for permission to charge custom milling prices pursuant to the provisions of Maximum Price Regulation 539."

I think the Court will get the wrong inference from that because the prior regulation, that is, Supplementary Service Regulation to Maximum Price Regulation 165, was supplanted by 539 and the requirements are exactly the same. They are set out in exactly the same language. And it was not of course

necessary to file a new application under 539. Yet the Court would get that idea from reading that paragraph XII.

The Court: The objection to paragraph XII is overruled.

Mr. Hughes: Now paragraph XVI, the last sentence, he says: "The Granite Falls Planing Mill was used for the purpose of securing prices in excess of the prices admitted the Defendants by the provisions of the [324] Pricing Tables under Article 5 of Revised Maximum Price Regulation 26."

There has been no evidence here, your Honor, justifying that statement and I submit that the Granite Falls Planing Mill has never been used nor has there been any evidence admitted here showing that it has been used for that purpose.

The Court: The objection to paragraph XVI is overruled.

Mr. Hughes: Then I have proposed some additional findings. I think, your Honor, the facts are undisputed except possibly as to one of the findings except possibly our proposed finding No. 4.

I think the evidence sustains each one of those findings that I have proposed to the Court, namely, 1, 2, 3 and 5. I say I think they are undisputed. No. 4 the Court may feel differently about, but I think the evidence is undisputed as to those others.

Mr. Hitchcock: As to the proposed findings, paragraph 1 I have incorporated in my findings word for word I believe. Is that correct, Mr. Hughes?

Mr. Hughes: I don't know if it is word for word.

Mr. Hitchcock: As to paragraphs 2, 3, 4 and 5, I object to those on the ground that the facts do not [325] substantiate those findings and therefore I have to object to them at this time.

The Court: Mr. Hitchcock, this is only a small matter but you say here that the Granite Falls Mill was operating 500 feet. I think the evidence shows 1,000.

Mr. Hitchcock: I will be glad to change that. We had a stipulation I believe that said 500 but I think Mr. Doran's testimony was a thousand, so I think it should be changed to 1,000. It is perfectly satisfactory with us.

The Court: It should be 1,000.

Mr. Hitchcock: And as to the Defendants' proposed findings, as I said before, I believe it is true that paragraph 1 is incorporated in my findings.

Mr. Hughes: I would like very much if your Honor could see your way clear to postpone the time when the motion for new trial is heard. I would be glad to put up any security that your Honor may suggest.

The Court: Well, as to the findings of the Plaintiff, with that one change from 500 to 1,000 feet—do you have the original?

Mr. Hitchcock: The original is before the Court.

Mr. Ogden: If your Honor please, Mr. Hughes [326] did not mention any objection to the conclusions of law and I think that very clearly, paragraph 2 should be changed. That paragraph reads:

“Plaintiff is entitled to judgment against the Defendants and each of them in the sum of \$19,130.67 and his costs herein.”

I believe it should be interlined in there saying, “but not in their individual capacity,” because otherwise it is stated, “and each of them,” and they are named as individuals at the top in the heading to the case and I don’t see how Mr. Doran as an individual would be protected unless that was interlineated in there.

Mr. Hughes: I had not gotten to the conclusions yet but it does seem to me, in view of the fact that those two Defendants, M. H. Wyman and Edward Doran, have been dismissed from the suit, that the judgment should not be against them; that the only Defendant now in the case is M. A. Wyman.

The Court: It cannot be against them in an individual capacity because they have been dismissed.

Mr. Hitchcock: That is right as to their individual capacity.

The Court: Now as to your motion for a new trial, Mr. Hughes.

Mr. Hughes: Has your Honor signed the judgment [327] too?

The Court: Yes.

Mr. Hughes: I would like to except as I said to the findings as I just mentioned here,—I mean to the conclusions rather. I object to paragraph 2 of the Conclusions. I don’t know what your Honor has written in there. Now the same would apply to the judgment, paragraph 2 of the judgment entered against the Defendants and each of them in the sum of so many thousands of dollars.

The Court: Very well. The record may so show your exceptions.

Mr. Ogden: I should also like to make objection on behalf of the Defendant Doran because my feeling is this, that the judgment would be the last instrument in this trial. It would be the instrument on which the Plaintiffs might seek to levy against the property of the Defendant Doran and I would just question whether or not some court would go clear back into the original file and find that they had been dismissed when it did not recite so in the final Judgment that is entered. That is what concerns me. I think we all understand each other here but the matter might come up on a supplementary proceeding to attach the property of Doran maybe six months or a year from now and Mr. Hitchcock might be in San Francisco or New York and not even attached to the Office of Price Administration. [328]

The Court: No Court would let such an execution stand. Now as to the motion for a new trial.

Mr. Hitchcock: You would prefer that would be submitted on brief?

The Court: I prefer it. However, if you [334] gentlemen want to come to Arizona, you would be welcome.

The Court (Interposing): Each and all of the orders heretofore made apply to the Defendant Doran.

Mr. Hughes: I think if your Honor will just write in the date to which it is extended.

The Court: Mr. Ogden, do you have a motion for a new trial?

Mr. Ogden: I didn't this morning, your Honor. I hadn't determined because I knew that I had ten days to determine whether or not I would make that motion. I had anticipated that your Honor would, in the order that was entered, exclude specifically Doran in his individual capacity. [335]

The Court: Oh, all of them are excluded in their individual capacity.

Mr. Ogden: In that case I doubt very much if we will go ahead any further in this matter.

The Court: Very well. In the event you care to, all rights and privileges extended to the Wy-mans are extended to Mr. Doran. If you care to take advantage of your right of appeal or anything else, you are entitled to it. That is understood, Mr. Hitchcock.

Mr. Hitchcock: Oh, yes. As a matter of fact, we will never try to enforce any judgment against Mr. Doran.

Mr. Ogden: Thank you.

The Court: Well, Mr. Hughes, in your Order you say "except Edward Doran." I will scratch it out and make it applicable to all defendants.

Mr. Hughes: That is satisfactory.

Mr. Ogden: All right.

The Court: This is all right I think.

Mr. Hughes: Do you have any objection?

Mr. Hitchcock: On the order?

The Court: Staying execution pending motion for new trial?

Mr. Hitchcock: No objection.

The Court: That concludes it, gentlemen. We will adjourn subject to being reconvened by the order [336] of the Court.

(At the hour of 11:40 a.m., Tuesday, October 1, 1946, proceedings in this case were adjourned subject to further order of the Court.)

CERTIFICATE

I, Merritt G. Dyer, Official Court Reporter, for the above-entitled Court, do hereby certify that the foregoing is a true and correct transcript of all the evidence and testimony adduced upon the trial of said cause, together with all objections and exceptions made and taken to the admission or exclusion of testimony or evidence, and all motions, offers to prove, stipulations and admissions upon the trial of said cause and rulings thereon.

/s/ MERRITT G. DYER,
Official Court Reporter.

[Endorsed]: No. 11701. United States Circuit Court of Appeals for the Ninth Circuit. M. A. Wyman; M. A. Wyman, doing business as M. A. Wyman Lumber Company; and M. A. Wyman, M. H. Wyman and Edward Doran, doing business as the Wyman Mill Company, Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed August 4, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11701

UNITED STATES OF AMERICA,

Appellee,

vs.

M. A. WYMAN, d.b.a. M. A. WYMAN LUMBER
COMPANY and M. A. WYMAN, M. H. WY-
MAN, and EDWARD DORAN, d.b.a. THE
WYMAN MILL COMPANY, and
M. A. WYMAN,

Appellants.

STATEMENT OF POINTS AND
DESIGNATION OF RECORD

Come now the above-named appellants, M. A.
Wyman, d.b.a. Wyman Lumber Company, and M.

A. Wyman, M. H. Wyman and Edward Doran, d.b.a. The Wyman Mill Company, and M. A. Wyman, and hereby adopt as their statement of points and as their designation of the record necessary for the consideration of the above appeal, the "Statement of Points" and "Designation of Contents of Record on Appeal" heretofore filed with the Clerk of the District Court.

/s/ C. E. HUGHES,
Attorney for Appellants.

Due service of the within Statement of Points and Designation of Record, together with the receipt of a true copy thereof, is hereby acknowledged August 1, 1947.

/s/ J. CHARLES DENNIS,
/s/ JOHN E. BELCHER,
Attorneys for Appellee.

[Endorsed]: Filed Aug. 4, 1947.

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Lumber Company, and M. A. WYMAN, M. H.
WYMAN and EDWARD DORAN, doing business
as the Wyman Mill Company, and M. A.
WYMAN, *Appellants,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLANTS

FILED
OCT 20 1947

PAUL P. O'BRIEN,
CLERK

C. E. HUGHES,
Attorney for Appellants.

1026 Henry Building,
Seattle 1, Washington.



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**IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

<p>M. A. WYMAN, doing business as M. A. Wyman Lumber Company, and M. A. WYMAN, M. H. WYMAN and EDWARD DORAN, doing business as the Wyman Mill Company, and M. A. WYMAN, <i>Appellants,</i></p> <p style="text-align:center">vs.</p> <p>UNITED STATES OF AMERICA, <i>Appellee.</i></p>	}	No. 11701
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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLANTS

JURISDICTION

This was an action brought by the Administrator of Price Administration, against Appellants, alleging overcharges in the sale of lumber, in violation of Revised Maximum Price Regulation 26 (10 Fed. Reg. 13050) and praying treble damages and injunctive relief. Jurisdiction of the District Court was claimed under Section 205(c) of the Emergency Price Control Act as amended in paragraph 2 of Count I, and paragraph 1 of Count II of the Second Amended Complaint.

Judgment was entered in this cause by the United States District Court for the Western District of Washington, Northern Division, October 1, 1946, denying injunctive relief, but awarding judgment against appellants and each of them, in the sum of \$19,130.67 and costs. Motion for new trial was served and filed by these appellants October 7, 1946, and denied by minute entry June 23, 1947. The United States of America was substituted as plaintiff July 9, 1947, for the purpose of this appeal. Notice of Appeal by these appellants was filed July 14, 1947. Jurisdiction of this court upon appeal is invoked under Section 128 of the Judicial Code (28 U.S.C.A., Sec. 225).

STATEMENT OF THE CASE

The Office of Price Administration, hereafter referred to as appellee, filed the original summons and complaint herein, and summons was issued thereon July 11, 1945 (R. 2), seeking in four counts, injunctive relief and treble overcharges against appellants and Granite Falls Planing Mill, a corporation, in the sum of \$62,347.83, for alleged violation of Revised Maximum Price Regulation 539 (10 Fed. Reg. 3224) a service regulation effective *March 31, 1945*, which fixes maximum prices for services performed in planing or surfacing lumber. Service of this summons and complaint was made on M. A. Wyman *only* (R. 11).

On November 7, 1945, nearly four months after the date of the issuance of the original summons, appellee filed a new summons and amended complaint

(R. 14) again charging a violation of Maximum Price Regulation 539 (9 Fed. Reg. 6152) between July 11 and December 22, 1944, and caused a new summons to issue on said date (R. 23) and on November 9, 1945, service of said summons and amended complaint was had on *M. H. Wyman* only, as an "individual" and as President of Granite Falls Planing Mill, a corporation (R. 24), and on November 20, 1945, service of said summons and amended complaint was had on Edward Doran only as an "individual" (R. 24). *This was the first service ever had on said corporation, M. H. Wyman or Edward Doran.*

The amended complaint contained only two counts. Count I, which sought injunctive relief, and Count II, treble overcharges (R. 14).

Motions were made by *all* the appellants to dismiss each of the two counts of the amended complaint on the ground that neither one stated a claim upon which relief could be granted (R. 32, 34).

The District Court, on February 15, 1946, granted appellants motions to dismiss Count II, the treble damage count, but denied the motions to dismiss Count I, the injunction count (R. 37).

Granite Falls Planing Mill, a corporation, *M. H. Wyman* and Edward Doran, also appeared specially, and filed motions supported by affidavits, to quash the service of the summons, and amended complaint (R. 25, 28) on the ground that the action had abated as to them under local rule 15, which provides that an action "shall abate" as to any defendants not served within 90 days after the issuance of the sum-

mons, and on February 15, 1946, the District Court entered the following order dismissing Granite Falls Planing Mill, a corporation, M. H. Wyman and Edward Doran (R. 36) :

“It is therefore ORDERED and ADJUDGED that Granite Falls Planing Mill, a corporation, defendant above named, be and it is hereby dismissed from said suit.

“It is further ORDERED and ADJUDGED that M. H. Wyman and Edward Doran, defendants above named, be and they are, hereby dismissed from said suit as individuals.”

Now notwithstanding said order, appellee filed a new summons and second amended complaint February 27, 1946, which omitted Granite Falls Planing Mill, a corporation, and also omitted M. H. Wyman and Edward Doran individually as defendants, but included M. H. Wyman and Edward Doran as partners of Wyman Mill Company (R. 39), seeking in two counts injunctive relief and treble overcharges, this time in the sum of \$57,392.57, and *changing the action* to an alleged violation of Revised Maximum Price Regulation 26 (10 Fed. Reg. 13050), a commodity regulation, which fixes maximum prices for the sale of certain kinds of lumber. The second amended complaint alleged that these violations occurred between July 11 and December 22, 1944. The statute of limitations admittedly expired *December 22, 1945* (R. 62, 63).

Motions were made by *all* the appellants to dismiss the second amended complaint, on the ground, among others, that it constituted a new and different cause

of action, not served or filed within the time fixed by law (R. 49, 51).

M. H. Wyman and Edward Doran preserving their special appearance, also moved to quash the service of the summons and second amended complaint, on the ground that both had already been dismissed from this suit on February 15, 1946, and no appeal had been taken therefrom, and on the further ground that the action had abated as to them and could not be revived by an amended complaint (R. 46, 47). This motion was granted, and on August 12, 1946, the following order was entered (R. 55):

“It is therefore ORDERED and ADJUDGED that the motions of M. H. Wyman and Edward Doran to quash the service of the summons and second amended complaint as to them in their individual capacity in the above cause, be and they are hereby granted.”

The District Court, however, denied the said motions of appellants to dismiss (R. 57), but entered an order on August 12, 1946, dismissing said M. H. Wyman and Edward Doran “individually” but not “as to their partnership liability.” In other words, the court seemed to hold that the action abated as to them individually, but not as partners.

The second amended complaint merely alleges that the defendants made numerous sales of lumber from July 11 to December 22, 1944, at prices in excess of Revised Maximum Price Regulation 26 (R. 39). *No fraud or deceit is alleged in any of the complaints.*

Appellants' answers deny the District Court's jurisdiction, and deny any violation of R.M.P.R. 26, and

plead affirmatively, a departure or change of the cause of action, after the expiration of the Statute of Limitations, estoppel and good faith (R. 58, 60).

Appellants at time of trial, but without waiving their right to object to certain testimony, entered into a written stipulation prepared by appellee (R. 62), which stipulation (para. 4) admits that the one-year statute of limitations expired December 22, 1945. The stipulation also admits (para. 3) that M.P.R. 539 is a service regulation, which fixes prices for *surfacing lumber*, and that R.M.P.R. 26 is a commodity regulation, which fixes prices for the *sale* of lumber.

The stipulation also admits (para. 11) that 3,122,-732 ft. of rough lumber sold and invoiced by M. A. Wyman, doing business as M. A. Wyman Lumber Co., for \$89,427.38 during 1944 is "*in accordance with the prices set forth in R.M.P.R. 26.*" These invoices became plaintiff's Exhibit "1." The stipulation further admits (para. 12) that Granite Falls Planing Mill, a corporation, invoiced and received payment of \$22,-955.44 for its services in surfacing this lumber. These invoices became plaintiff's Exhibit "2." This \$22,-955.44, less cartage or trucking charges, which was waived by appellee (R. 179, 180), leaves, according to appellee's computation, \$19,130.67, single the amount of alleged overcharges mentioned in the judgment (R. 73). Count I, the injunction count, was dismissed by the District Court at time of trial (R. 72, 250).

Mr. Rothfield, appellee's *only* witness concerning

overcharges, and whose testimony deserves scrutiny, stated that he was an investigator for the O.P.A. (R. 123). He admitted, however, that he had never seen or talked to any of appellants (R. 129, 130, 149, 153) and further admitted *that he knew nothing whatsoever about this case*, except as shown by the invoices (R. 129, 146, 147, 148, 149, 156, 157) brought to him by others (R. 129, 146, 153, 154) and certain "confidential information" (R. 156, 157) which latter he refused to divulge (R. 147, 148, 149, 156, 157). He also testified that he didn't even believe what the invoices showed (R. 163, 177, 179). Yet this witness was permitted over repeated objections (R. 104, 113, 120, 121, 122, 124, 129, 132, 133, 134, 140, 141 and 144) to state his conclusions based purely on hearsay and his imagination, that M. A. Wyman sold planed or surfaced lumber (R. 134, 135, 137, 138, 141, 142, 160, 162, 163, 164, 177 and 179) and that he used the Granite Falls Planing Mill, a corporation (which was long before dismissed from this suit) as a "dummy" to evade R.M.P.R. 26 (R. 160, 162, 163, 164 and 177) without *any facts* on which to base these conclusions. The conclusions of this witness were not only contradicted by the invoices introduced by appellee, but also by other witnesses produced by appellee (R. 115, 116, 209, 211, 213). This witness, however, did finally state *one* fact, and that is that no complaint had ever been made to the O.P.A. by any one, against either M. A. Wyman or Granite Falls Planing Mill (R. 157).

The attorneys for appellants and appellee have filed in the above entitled cause, for use on appeal,

the following additional stipulation, as to the contents of all of plaintiff's exhibits:

(U.S. Circuit Court of Appeals, Ninth Circuit, and Cause.)

"STIPULATION RE EXHIBITS

"It is hereby stipulated and agreed by and between C. E. Hughes, attorney for appellants above named, and J. Charles Dennis and John E. Belcher, attorneys for appellee above named, that all of plaintiff's exhibits introduced in evidence at the trial of the above cause are described as follows:

"1. Plaintiff's Exhibit '1' consists only of invoices of rough lumber sold by M. A. Wyman d/b/a M. A. Wyman Lumber Company to his customers from July 10 to December 22, 1944, totalling 3,122,732 feet board measure for which said M. A. Wyman Lumber Co. received \$89,-427.38 in accordance with Revised Maximum Price Regulation 26. This Exhibit '1' covers the same transactions mentioned in paragraph 11 of stipulation. (R. 64)

"2. Plaintiff's Exhibit '2' consists only of invoices sent by Granite Falls Planing Mill, a corporation, to its customers for services performed by said corporation for surfacing 3,122,752 feet board measure of lumber for which said corporation received \$22,955.44. This Exhibit '2' covers the same transactions mentioned in paragraph 12 of stipulation. (R. 64)

"3. Plaintiff's Exhibits '3' and '4' were not admitted in evidence.

"4. Plaintiff's Exhibit '5' consists only of bills of lading showing shipments of rough lumber by M. A. Wyman, d/b/a M. A. Wyman Lumber

Company to his customers, being the same lumber mentioned in plaintiff's Exhibit '1.'

"5. Plaintiff's Exhibit '6' consists only of figures showing calculation by appellee of alleged overcharges based on RMPR 26 which appellee claims establishes maximum prices for surfacing (planing) lumber, which calculation appellants claim is erroneous.

"6. Plaintiff's Exhibit '7' was not admitted in evidence.

"7. Plaintiff's Exhibit '8' consists only of letters from M. A. Wyman, d/b/a M. A. Wyman Lumber Co. to N. P. Ry. Co., enclosing bills of lading in accordance with instructions from the customers of said M. A. Wyman Lumber Co.

"8. Plaintiff's Exhibit '9' was not admitted in evidence.

"9. This stipulation is entered into to avoid the expense of printing said exhibits and to present the substance of said exhibits.

"DATED at Seattle, Washington, October 6, 1947.

C. E. HUGHES

Attorney for Appellants

J. CHARLES DENNIS

JOHN E. BELCHER

Attorneys for Appellee.

"Filed October 8, 1947."

It will be noted that *each* of the invoices comprising plaintiff's exhibit "1" contains this statement:

"This lumber delivered to Granite Falls, Planing Mill, Inc., as per your instructions to us, and to be milled and handled by them in accordance with your instructions to them." (R. 162)

It is also admitted that the prices charged in plaintiff's Exhibit "1" are correct (R. 135, 139).

It should also be noted here that appellee's Exhibit "2" has been mislabeled, "Copies Surfacing Invoices M. A. Wyman Lumber Co." The evidence and an inspection of this exhibit, however, together with the stipulation (R. 64) and the later stipulation dated October 6, 1947, clearly show that these invoices are Copies of Surfacing Invoices of *Granite Falls Planing Mill*.

Appellants' Exhibit "A-1" (R. 119) is a letter addressed to Granite Falls Planing Mill from its customer, directing it to perform certain planing services on lumber, and how to ship it. A similar letter covered *each* of the invoices mentioned in plaintiff's Exhibit "2" (R. 118).

Now these invoices, bills of lading and letters are regular and show no fraud. In fact the stipulation admits "That such procedure was customary at said time" (R. 65). Yet Mr. Rothfield concluded, admittedly *without any facts* that because M. A. Wyman was President of Granite Falls Planing Mill he used that corporation as a dummy in violation of R.M.P.R. 26 (R. 160, 162, 164, 177) even though these invoices, letters and bills of lading are regular, and the evidence is undisputed that this corporation never sold any lumber to *anyone* (R. 228, 229) also that appellants never sold any services for planing lumber (R. 229) also that M. A. Wyman never sold anything but rough lumber (R. 226) and that the customers of Granite Falls Planing Mill could have had these planing services done elsewhere (R. 226, 227).

M. A. Wyman was President of Granite Falls Plan-

ing Mill, a corporation, during 1944, but there is not a syllable of evidence that he ever had any connection with the alleged overcharges, or that he had anything to do with fixing any prices. Indeed the testimony of another witness for appellee, shows that M. A. Wyman had nothing whatsoever to do with the alleged overcharges and that he never planed or surfaced any lumber or sold any milling services to any one (R. 211), or ever fixed any prices (R. 213). The record is also barren of any evidence even tending to show a violation of any regulation by M. H. Wyman or Edward Doran.

This same biased and over-zealous witness, also testified that R.M.P.R. 26 (10 Fed. Reg. 13050) establishes maximum prices for *surfacing* (planing) lumber (R. 124, 125, 126, 151, 152, 165) and that his calculation of overcharges for services in planing lumber in the sum of \$19,130.67 (plaintiff's Exhibit "6") is based on R.M.P.R. 26, Table 2 (R. 124, 130, 131, 132, 179, 180).

Now a mere reference to R.M.P.R. 26 (10 Fed. Reg. 13050) will show that this regulation nowhere establishes any prices for surfacing or services to lumber. All lumber services, including planing, are covered only by M.P.R. 539 (9 Fed. Reg. 6152). If it were otherwise, then M.P.R. 539, designed solely for services to lumber, would be useless. His calculation of overcharges in the sum of \$19,130.67, is, therefore, erroneous. He should have used M.P.R. 539, tables 1 and 2, the regulation issued for that purpose and used by appellants.

Maximum Price Regulation 165 (9 Fed. Reg. 7439)

a service regulation, fixed prices for servicing lumber up to May 3, 1944, on which date Supplementary Service Regulation 27 to M.P.R. 165 (9. Fed. Reg. 4227) became effective, and on June 5, 1944, M.P.R. 539 (9 Fed. Reg. 6152) supplanted S.S.R. 27 to M. P.R. 165 (R. 69, 158, 159, 166, 170, 184, 185).

S.S.R. 27 to M.P.R. 165 and M.P.R. 539 are substantially the same (R. 186). The qualifying requirements of both are *exactly the same*. They both provide (Sec. 4(b)(2) I, II, III, IV) that even though a planing mill is owned, or partially owned or controlled by the same persons who operate a sawmill, it (planing mill) may operate under these regulations (R. 169) if the O.P.A. *finds* from the application in substance that it (R. 174) :

- I. Will result in greater production of surfaced lumber.
- II. Will not encourage sawmills to ship green lumber.
- III. Will provide milling services that cannot be otherwise supplied.
- IV. Will not result in increasing cost to consumer.

May 3, 1944, Granite Falls Planing Mill, a corporation, filed its application (defendants' Exhibit "A-2," R. 172) with the O.P.A. to operate under S.S.R. 27 to M.P.R. 165 (R. 183). This application was received the same day by Mr. Wurnsted, "Lumber Specialist," for the O.P.A. at Seattle (R.171, 183) who admittedly handled such applications (R. 187). He also admitted he told Mr. Wyman that he (Wurnsted) would look the planing mill over and see what could be done with the application (R. 189), because

he said the Government was in need of surfaced lumber for war and there were no other planing facilities in that district (R. 192). He and Mr. Rothfield both admitted that this application was *never investigated* (R. 175, 176, 177, 193), and that it laid on his desk (R. 194) and he did nothing about it until a year later, May 5, 1945, when he was finally ordered by the O.P.A. to return the application to Granite Falls Planing Mill, accompanied by a letter from him (defendants' Exhibit "A-3") (R. 195, 196, 197) in which he attempted to excuse his neglect by saying that the new regulation M.P.R. 539 "changed the qualifying requirements of S.S.R. 27 to M.P.R. 165."

Now it was bad enough to neglect this application for a year, *knowing* in the meantime that Granite Falls Planing Mill was operating under M.P.R. 539 (R. 203, 235) but his "excuse" that M. P. R. 539 "changed the qualifying requirements" of S.S.R. 27 to M.P.R. 165, is not only baseless, but *false*, because a reference to these two regulations will show that the qualifying requirements are exactly the same *verbatim*.

Mr. Wurnsted also claimed that since no time is fixed by the regulation to accept or reject an application, he had a right to keep it for a year before notifying the applicant (R. 203, 204), even though he knew during 1944, that Granite Falls Planing Mill was then operating under M.P.R. 539 and permitted it to so operate (R. 203), and didn't return the application or object to its operation until long after it had ceased to operate (R. 203).

He also claimed that even if the qualifying requirements of S.S.R. 27 to M.P.R. 165 and M.P.R. 539 were exactly the same (R. 235, 236) that the corporation should nevertheless have made a new application to operate under M.P.R. 539 (R. 194). We believe such a claim is super-technical. M.P.R. 539, Sec. 4(d) impliedly at least, refutes that contention.

Now the evidence is uncontradicted, and an investigation by the O.P.A. would have shown, that the applicant *qualified* under Sec. 4(b) (2) I, II, III and IV of M.P.R. 539 (R. 174, 234, 235, 237, 238) and was, therefore, entitled to charge the prices fixed by that regulation. Appellee also admits that no complaint was ever made against any of appellants by their *customers or anyone else* (R. 157), and it is undisputed that it would have cost the customer *more* than it did to have had any other planing mill perform the same services (R. 224, 239, 240). Therefore, admittedly *no one has been injured*.

SPECIFICATION OF ERRORS

1. The District Court erred in denying appellants' motions to dismiss this case, on the ground that appellee changed his cause of action, after the expiration of the Statute of Limitations (R. 57, 103, 106, 107, 108, 109, 217).

2. The District Court erred in adopting appellee's computation of overcharges based on the theory that Revised Maximum Price Regulation 26 (10 Fed. Reg. 13050) fixed or established prices for *surfacing or planing lumber* (R. 124, 125, 126, 130, 131, 132, 143, 151, 152, 165, 179, 180).

3. The District Court erred in paragraph VI of its Findings of Fact (R. 67) and concluding as a matter of law that:

“Defendants made numerous sales of Douglas Fir and other West Coast surfaced lumber between July 11, 1944, to and including December 22, 1944, to purchasers for use or consumption in the course of trade or business, at prices in excess of the maximum prices fixed by the Price Tables under Article V of R.M.P.R. 26.”

4. The District Court erred in permitting over appellants' objections (R. 104, 113, 120, 121, 122, 124, 129, 132, 133, 134, 140, 141, 144) Mr. Rothfield, appellee's only witness, who claimed or sought to establish fraud, to merely state his conclusions that M. A. Wyman sold planed or surfaced lumber (R. 137, 138, 141, 142, 160, 162, 163, 164, 177, 179) and that he used Granite Falls Planing Mill, a corporation as a “dummy” to violate Revised Maximum Price Regulation 26 by trickery (R. 160 162, 163, 164, 177) and that M. A. Wyman and Granite Falls Planing Mill were one and the same person (R. 161, 162, 163, 177, 179), after this witness had admitted that he had never seen or talked to any of appellants (R. 129, 130, 149, 153) and after he had also admitted that he knew nothing whatsoever about this case, except as shown by the invoices (R. 129, 146, 147, 148, 149, 156, 157), which invoices contradict his testimony (Stipulation dated Oct. 6, 1947) on the ground that his testimony was only his conclusion or opinion, based on hearsay or his imagination, and not based on *any facts* shown by any testimony.

5. The District Court erred in Paragraph XVI of its Findings of Fact (R. 70) and concluding as a matter of law that:

“Granite Falls Planing Mill was used for the purpose of securing prices in excess of the prices permitted the defendants by the provisions of the pricing tables under Article V of Revised Maximum Price Regulation 26.”

6. The District Court erred in holding M. A. Wyman personally liable for any alleged dereliction of Granite Falls Planing Mill, a corporation, merely because he was an officer thereof.

7. The District Court erred in failing to conclude as a matter of law, that appellee was estopped to maintain this action by the course of conduct of his subordinates (R. 171, 172, 174, 183, 187, 194, 195, 196, 197, 203, 220, 221, 235, 236, 238, 239).

8. The District Court erred in awarding any judgment against M. H. Wyman or Edward Doran, after they had been dismissed from this action (R. 36) and no further action was taken until after the expiration of the Statute of Limitations (R. 39) and the evidence failed to connect either of them with the violation of any regulation.

9. The District Court erred in denying appellants' motions to dismiss this case at the close of appellee's testimony for failure of proof (R. 217, *et seq.*).

10. The District Court erred in awarding any judgment against these appellants (R. 72) and in failing to adjudge that the action should be dismissed.

11. The District Court erred in denying appel-

lants' motions for a new trial (R. 79) on the ground of surprise and failure of justice (R. 108, 109, 110, 111).

SUMMARY OF ARGUMENT

1. The second amended complaint filed and served after the statute of limitations had expired, changed the cause of action, from a violation of M.P.R. 539 to a violation of R.M.P.R. 26, requiring entirely different proof, and the evidence at trial further changed the cause of action by permitting hearsay testimony to establish fraud, when no fraud or deceit was alleged in any of the complaints.

2. The evidence failed to show that R.M.P.R. 26 fixes any prices for services performed in surfacing or planing lumber. This regulation only fixes the prices for the *sale* of rough, green or surfaced lumber. All lumber *services*, including planing, are covered only by M.P.R. 539.

It therefore follows, that appellee's calculation of overcharges (plaintiff's Exhibit 6) for planing lumber based on R.M.P.R. 26 is all wrong.

3. The evidence fails to sustain finding No. VI, that these appellants sold any surfaced lumber, or that they sold *any* lumber, except rough green lumber, which the stipulation admits is "in accordance with the prices set forth in R.M.P.R. 26." The Stipulation dated October 6, 1947 also confirms this statement.

4. Not one of the three complaints alleged any fraud or deceit, yet appellee's *only* witness who claimed any fraud, was permitted over repeated objections, to

state his conclusions, based on hearsay, that M. A. Wyman and Granite Falls Planing Mill, a corporation, long before dismissed from this suit, were one and the same person, and that M. A. Wyman used this corporation as a dummy, to violate R.M.P.R. 26, after this witness had admitted that he had no facts on which to base those conclusions, and in the face of the admitted fact that this corporation never sold any lumber to any one, and the further fact that appellee's own witness admitted that M. A. Wyman had nothing whatsoever to do with the alleged overcharges, and the further fact that the invoices introduced by appellee contradict those conclusions.

5. There is no evidence to sustain finding No. XVI that appellants used Granite Falls Planing Mill, a corporation, to violate R.M.P.R. 26, except the conclusion of one witness who admitted that he knew nothing about this case, except as shown by the invoices, which are admittedly regular.

6. The stipulation and evidence admit that appellee's Exhibit "1" complies with R.M.P.R. 26. The only other invoices in evidence, on which any overcharge could possibly be based is appellee's Exhibit "2," which shows that Granite Falls Planing Mill invoiced and received payment of \$22,955.44 for surfacing charges, which fact the evidence and stipulations also admit.

Therefore *if* any overcharges were made, they were *made and received only by the corporation*. Even if the corporation were a party to this suit, which it is not, the mere fact that M. A. Wyman was President

of the corporation, would not make him personally liable, especially where appellee's own witness admitted that he had nothing whatsoever to do with the alleged overcharges.

7. An application was made by Granite Falls Planing Mill, a corporation, as provided by Regulation, which was duly received by the O.P.A. May 3, 1944, to operate under Supplementary Service Regulation 27 to M.P.R. 165 (9 Fed. Reg. 4227), which became M.P.R. 539 (9 Fed. Reg. 6152) on June 5, 1944.

The evidence is undisputed that this corporation was entitled to so operate, and did so operate until December 22, 1944. The O.P.A. kept this application for over a year without any investigation or action thereon, and finally returned the application on May 5, 1945, *knowing in the meantime* that the corporation was operating under M.P.R. 539, and their only "excuse" for this neglect was that M.P.R. 539 changed the qualifying requirements of S.S.R. 27 to M.P.R. 165, when, as a matter of fact, the qualifying requirements were the *same verbatim*. We believe such conduct amounts to an estoppel.

8. After the summons and amended complaint were filed, M. H. Wyman and Edward Doran were both dismissed from this suit on motion, by formal order of this court entered and filed February 15, 1946, on the ground that this action abated as to them October 10, 1945, under local Rule 15. The Statute of Limitations also admittedly expired December 22, 1945. The Second Amended Complaint was not filed until February 27, 1946.

Notwithstanding said order of dismissal, appellee made M. H. Wyman and Edward Doran defendants in the second amended complaint, and on August 12, 1946, an order was entered on motion, dismissing both of them "individually," but not "as to their partnership liability."

Now if the action abated as to them it would seem that all rights thereunder as to them, likewise abated. In any event the filing and service of the second amended complaint was admittedly made after the expiration of the statute of limitations.

9. The pleadings and evidence in this case show a complete change of the cause of action, after the expiration of the statute of limitations. The evidence also shows that appellee claimed that R.M.P.R. 26, table 2, establishes maximum prices for surfacing or planing lumber and his calculation of the alleged overcharges is based on R. M. P. R. 26, table 2. R.M.P.R. 26 nowhere fixes the prices for surfacing or planing lumber. The prices for surfacing or planing lumber are covered only by M.P.R. 539. Hence appellee's calculation of overcharge for *planing* lumber based on R.M.P.R. 26, is all wrong.

The evidence fails to show that appellants sold any lumber, except green, rough lumber, which both stipulations admit is in accordance with R.M.P.R. 26.

The evidence also fails to show that M. A. Wyman had anything to do with any alleged overcharges.

The evidence also shows that appellee should be estopped by the course of conduct of his subordinates.

The pleadings and evidence also show that this

action abated as to M. H. Wyman and Edward Doran, October 10, 1945, and they were formally dismissed February 15, 1946. The statute of limitations expired December 22, 1945, and the second amended complaint was not filed until February 27, 1946.

We also believe the trial court abused its discretion, in permitting appellee to surprise appellants, by changing the issues without notice at the time of trial, resulting in a failure of justice to appellants, and that appellants are entitled at least to a new trial.

ARGUMENT OF THE CASE

I.

Pleadings and Evidence Show Change of Cause of Action

The first two complaints (R. 2, 14) alleged that Granite Falls Planing Mill, a corporation, was the only defendant engaged in planing or services to lumber, but sought treble overcharges against *all* the defendants for alleged violation of Maximum Price Regulation 539 (10 Fed. Reg. 3224 and 9 Fed. Reg. 6152).

The Second Amended Complaint, filed and served after the statute of limitations had expired (R. 39) changed the cause of action from a violation of M.P.R. 539, a service regulation, to Revised Maximum Price Regulation 26 (10 Fed. Reg. 13050), a commodity regulation, and introduced a new and different cause of action, based on a different wrong and requiring entirely different proof.

Motions were made by all the appellants before an-

swearing (R. 49, 51) and at the close of appellees' testimony (R. 217) to dismiss this case, on the ground that the second amended complaint changed the cause of action, after the expiration of the statute of limitations. These motions, however, were denied (R. 57, 221). 50 U.S.C.A., Sec. 925(e) provides, that the Administrator must bring this action "within one year from the date of the occurrence of the violation." The violations allegedly occurred between July 11 and December 22, 1944 (R. 41). The statute of limitations admittedly expired December 22, 1945 (R. 62, 63). The second amended complaint was not filed until February 27, 1946 (R. 43).

The test applied by most courts to determine whether or not a cause of action has been changed is—Does it require substantially different or additional testimony? If it does, then the cause of action has been changed.

The following is a partial list of authorities upholding this test:

Salyers v. U.S. (C.C.A. 8, 1919) 257 Fed. 255;

Kunselman v. Sou. Ry Co. (Ariz., 1928) 263 Pac. 939;

Stowe v. May (Mich., 1929) 226 N.W. 237;

Humphries v. McAuley (Ind., 1933) 187 N. E. 262;

Arrowood v. Delaney's Est. (Mo., 1927) 295 S.W. 522;

29 A.L.R. 636;

21 R.C.L. 583;

31 Cyc. 418.

Now manifestly proof of violation of R.M.P.R. 26, a commodity regulation, which fixes prices only for the sale of lumber, requires entirely different proof than does proof of violation of M.P.R. 539, a service regulation, which fixes prices only for services performed in surfacing lumber. The bases of the two wrongs are different and their essential elements are different. True, both regulations came under the Emergency Price Control Act, and so did for instance, sugar, rent and shingles. Certainly appellee cannot contend that a complaint under any one of those three items may be amended to charge either of the other two, after the statute of limitations has expired.

In *Union Pacific Ry. v. Wyler* (1895) 158 U.S. 285, 39 L. ed. 983, which has been cited many times with approval, the court, speaking through Mr. Justice White, in discussing this question, said:

“A departure may be either in substance of the action, or the law on which it is founded * * *

“The latitude of amendment allowed the plaintiff cannot be permitted to work injustice to the defendant, or to deprive him of any just and rightful defense. The plaintiff may introduce a new cause of action by amendment, but such amendment cannot have relation to the commencement of the suit, so as to avoid the bar of the statute of limitations, if the statute would operate as a bar to a new suit commenced for that cause of action, at the time of making the amendment.”

In *Whalen v. Gordon* (C.C.A. 8, 1899) 95 Fed. 305, plaintiff brought an action to recover damages for breach of warranty, and after the statute of limita-

tions had run, he amended his complaint to recover as for a rescission of contract. Judge Sanborn, in a very exhaustive opinion, held that the amendment did not relate back to the beginning of the action, as to stop the running of the statute,

See also:

U.S. v. Norton (C.C.A. 5, 1901) 107 Fed. 412;

Walker v. Ia. Ry. Co. (D.C. Ia., 1917)
241 Fed. 395;

Ronald Press Co. v. Shea (D.C., N.Y., 1939)
27 F. Supp. 857;

Walker v. Hester (Kan., 1900) 59 Pac. 662;

Mer. Nat. Bank v. Bentel (Calif., 1913)
137 Pac. 25.

In *Whitman Const. Co. v. Remer* (C.C.A. 10, 1939) 105 F(2d) 371, where an amended complaint was filed after statute of limitations had run, introducing a different cause of action, the court held that the New Federal Rules of Civil Procedure does not permit an amendment which introduces a different cause of action, after the bar of the statute of limitations.

See also:

Schwartz v. Met. Ins. Co. (D.C., Mass. 1941)
2 F.R.D. 167.

The evidence at trial further changed the original and amended complaints by attempting to show fraud (R. 160, 162, 163, 164, 177, 179) when no fraud or deceit was alleged in *any* of the complaints.

We concede that the New Federal Rules of Civil Procedure have liberalized pleadings, but as the visiting trial judge remarked (R. 108):

“This thing of filing a Mother Hubbard pleading, and coming in and proving anything that is in the mind of the plaintiff, that shall not be tolerated by the courts, because that is resorting to trickery, and courts are not established for that purpose.”

We are satisfied that if fraud had been alleged in the second amended complaint, the trial court would have dismissed this case before trial. Yet the court permitted appellee to accomplish his purpose indirectly, by not only changing his cause of action, but by attempting also to show fraud, when none was alleged.

Furthermore, appellee has never yet asked the Court to permit him to amend his pleadings to show fraud. Nor do we believe the trial court would have permitted him to do so under the issues in this case.

II.

R.M.P.R. 26 Fixes No Prices for Services to Lumber

Mr. Rothfield, appellee's only witness, concerning overcharges, testified that “Revised Maximum Price Regulation 26 establishes maximum prices for surfacing (planing) lumber” (R. 124, 125, 126, 151, 152, 165) and that his calculations of \$19,130.67 overcharges for services in *planing* this lumber is based on R.M.P.R. 26, table 2 (R. 124, 130, 131, 132, 179, 180).

We believe the trial court was misled by these two statements, because a reference to R.M.P.R. 26 will show that it no where fixes any prices for surfacing or services to lumber. All lumber services, including

planing, are covered *only* by Maximum Price Regulation 539. *We challenge counsel to disprove that statement.*

Therefore, appellee's calculation of the overcharges are all wrong, because he should have used M.P.R. 539, tables 1 and 2, the regulation issued for that purpose, and used by appellants.

III.

No Evidence That Appellants Sold Any Surfaced Lumber

The trial court's finding No. VI is as follows (R. 67):

"Defendants made numerous sales of Douglas Fir and other West Coast surfaced lumber between July 11, 1944, to and including December 22, 1944 * * * in excess of the maximum prices fixed by the Price Tables under Article V of R.M.P.R. 26."

Article V, Table 2, of said regulation fixes the prices for the sale of rough, green and surfaced lumber *only*.

Now, the only evidence of any sales of lumber by any of appellants is plaintiff's Exhibit "1." This exhibit and evidence show sales of only rough, green lumber by M. A. Wyman Lumber Co., to his customers, for which the M. A. Wyman Lumber Co. received \$89,427.38. The evidence and stipulation both admit that these sales were in accordance with the prices set forth in R.M.P.R. 26.

The stipulations and evidence also admit that Granite Falls Planing Mill, a corporation, invoiced and received payment of \$22,955.44 for surfacing charges.

Now *if* there is a violation of any regulation, it can be only by this corporation, which was dismissed from this suit before trial, and since this corporation admittedly sold no lumber, it cannot be in violation of R.M.P.R. 26. When this corporation was dismissed from this suit, this action should then have been dismissed.

IV.

Hearsay and Conclusions of Witness Inadmissible

It will be remembered that none of the complaints alleged any fraud or deceit. Therefore, under the issues in this case any evidence or conclusions of fraud or trickery was inadmissible, not only because it made a further change in the cause of action after the statute of limitations had run, but because it was outside the issues in the case.

Where a judgment is based on fraud, through the testimony of *one* witness, who admits on the witness stand, that he knows nothing about the case, except as shown by the invoices, which appear regular, and is permitted over repeated objections to state merely his conclusions, based purely on hearsay or imagination, which even contradict the very invoices produced by him, as was done in this case, we don't believe this court will permit such a judgment to stand.

A reference to Mr. Rothfield's testimony will show him as an "O.P.A. crusader" whose sole aim was the conviction of M. A. Wyman.

He testified over repeated objections (R. 104, 113, 120, 121, 122, 124, 129, 132, 133, 134, 140, 141, 144) that M. A. Wyman used the Granite Falls Planing

Mill, a corporation, as a dummy, to evade R.M.P.R. 26 (R. 160, 162, 163, 164, 177) and that M. A. Wyman and Granite Falls Planing Mill were one and the same person and that M. A. Wyman sold surfaced lumber (R. 134, 135, 137, 138, 141, 162, 163, 164, 177, 179), but he finally admitted that he had never talked to any of appellants (R. 129, 130, 149, 153) and that he knew *no facts* upon which to base these conclusions (R. 129, 146, 147, 148, 149, 156, 157). In other words, he attempted to convert the plain words of the invoices into fraud, admittedly without any facts. His evasion and insincerity are clearly shown in the record on pages 146, 147, 148, 149 and 175, 176, 177.

We confidently believe the trial court erred in relying upon, or even permitting such testimony.

The further fact, that the trial court dismissed Count I,—the injunction count—(R. 72) and awarded judgment for only single the amount of alleged overcharges (R. 72, 249) would indicate the absence of any fraud.

V.

No Evidence Granite Falls Planing Mill Was Used to Violate R.M.P.R. 26

The trial court's finding No. XVI (R. 70), which is really a conclusion, is as follows:

“* * * The Granite Falls Planing Mill was used for the purpose of securing prices in excess of the prices permitted the defendants by the provisions of the Pricing Tables under Article V of Revised Maximum Price Regulation 26.”

There was no evidence to sustain that finding.

True, M. A. Wyman, M. H. Wyman and Edward Doran owned stock in Granite Falls Planing Mill, a corporation, but how, or in what way this corporation was used or could be used to violate R.M.P.R. 26 is not shown, either by the findings or evidence, because this corporation admittedly *never sold any lumber*.

Both the invoices and stipulations show that this corporation only surfaced lumber, for which it alone invoiced and received payment (R. 64). Therefore, the corporation could not be used to violate R.M.P.R. 26.

VI.

Officer of Corporation Not Personally Liable for Acts of Corporation

The burden of proving M. A. Wyman's connection with the alleged overcharges is placed entirely upon appellee. The only evidence tending to connect M. A. Wyman, if it may be called evidence, is the conclusion of Mr. Rothfield, admittedly based on hearsay only, and without any investigation (R. 129, 146, 147, 148, 149, 156, 157), that M. A. Wyman used the Granite Falls Planing Mill, a corporation, for trickery and evasion (R. 160, 162, 163, 164, 177). This witness *merely assumed* that because M. A. Wyman was President of Granite Falls Planing Mill, a corporation, he knew all about the alleged overcharges made by that corporation, in spite of the invoices and the positive testimony of appellee's other witness, that M. A. Wyman had nothing whatsoever to do with the alleged overcharges (R. 115, 116, 209, 211, 212, 213).

M. A. Wyman cannot be held personally liable for

any dereliction of Granite Falls Planing Mill merely because he happened to be President of that corporation, especially since the corporation is not a party to this suit.

In *Briggs v. Spaulding* (1891) 141 U.S. 132, 35 L. ed. 663, which was an action for damages against the officers of a corporation, Mr. Chief Justice Fuller, in discussing this question said (p. 146):

"The performance of acts which are illegal or prohibited by law, may subject the corporation to a forfeiture of its franchise, and the directors to criminal liability, *but this would not render them civilly liable for damages.*" (Italics ours)

See also:

Barry v. Legler (C.C.A. 8, 1930) 39 F.(2d) 297;

Folwell v. Miller (C.C.A. 2, 1906) 145 Fed. 495.

Fletcher Cyc. Corp. (Per. Ed.) Vol. 3, Sec. 1024:

"If acts are expressly prohibited by the charter or a statute, but liability for violation thereof is not imposed on corporate officers by the charter or statute, the doing of such an act, does not make the officers personally liable merely because the act is in violation of the charter or statute."

See also:

Sow Thrift Co. v. Rairdon (Cal. 1941) 118 P.(2d) 828;

Kiel v. Frank Shoe Co. (Wisc. 1944) 14 N.W.(2d) 164;

Kulesza v. Chicago News (Ill. 1941) 35 N.E.(2d) 517;

Beeler v. Riling (Kan. 1931) 296 Pac. 365;

Darling v. Fry (Mo. 1930) 24 S.W.(2d) 722;

McGuire v. La. Baptist Encamp. (La. 1940) 199 So. 192;

19 C.J.S. 272.

Neither the Emergency Price Control Act (50 U.S.C.A., Sec. 925), nor the regulation, makes any *officers* of a corporation personally liable in money damages. The Act makes the "seller" liable for money damages, but not the agent of the seller. The stipulations admit that Granite Falls Planing Mill invoiced and received payment of the alleged overcharges. Therefore it is admittedly the "seller," and the only one liable.

In the late case of *Cochran v. Nelson* (Wash. 1946) 173 P.(2d) 769, which was an action against the agent of the seller to recover treble overcharges under the Emergency Price Control Act, the court discussed this question at length, and quoted with approval *Bowles v. Cardinal Cutlery Corp.*, decided Jan. 28, 1946 by the U. S. District Court in which both courts held that:

"An officer of the corporation is not the seller, even though he may fix an illegal price and personally negotiates the sale. The acts of the salesman or the officer may constitute a violation of the Price Regulation, for which he may be prosecuted under Sec. 205(b) or enjoined under 205(a). He is punished or enjoined because he is a violator. But because he is not the "seller" he is not liable in money damages under 205(e)."

There is still another reason why M. A. Wyman

cannot be held personally liable for the acts of the corporation. We realize that courts will pierce the "corporate veil," but will do so only when the corporation is a party defendant. Especially where it is admitted by stipulations that the corporation received the alleged overcharges. Because the corporation that received the money is primarily liable, and judgment must therefore first be obtained against the corporation.

Swan Land Co. v. Frank (U.S. Cir. Court Ill. 1889) 39 Fed. 456, was an action to recover damages against the officers of two corporations on the ground that the officers had possession of certain assets of these corporations. The corporations were not made parties defendant. The District Court sustained a demurrer to the complaint and dismissed the action, because the corporations were necessary parties defendant, and the U. S. Supreme Court in *Swan Land Co. v. Frank*, (1893) 148 U.S. 603; 37 L. ed. 577, in affirming the decision of the District Court said:

"Now it is too clear to admit of discussion, that the various corporations charged with fraud which has resulted in damage to the complainant, are necessary and indispensable parties to any suit to establish the alleged fraud, and to determine the damages arising therefrom. Unless made parties to the proceeding in which these matters are to be passed upon and adjudicated, neither they, nor the other stockholders would be concluded by the decree."

One may easily imagine a case where a disgruntled stockholder may cause some third person to sue the President of the corporation alone, for some derelic-

tion of the corporation, and thus according to appellee's theory the corporation could escape liability.

The reason the corporation is not a party to this suit, and the only reason is, that it has been dismissed (R. 36) and cannot be made a party.

VII.

Estoppel

We believe Mr. Wurnsted the "Lumber Specialist" for the O.P.A. at Seattle, who admittedly received the application of Granite Falls Planing Mill May 3, 1944 (R. 172, 183, 186) made in good faith to operate under Supplementary Service Reg. 27 to M.P.R. 165 (9 Fed. Reg. 4227) which became Maximum Price Regulation 539 (9 Fed. Reg. 6152) on June 5, 1944 (R. 184), and who did nothing about the application for over a year (R. 194, 195) and after it had ceased operation (R. 197, 199) he returned the application on May 5, 1945 (R. 196, 197) *knowing* in the meantime that this corporation was operating under M.P.R. 539 (R. 203, 235), amounts to an *estoppel*. And this estoppel is fortified, by Mr. Wurnsted's letter returning the application (R. 195, 196, 197) wherein he says that M.P.R. 539, superseding S.S.R. 27 to M.P.R. 165, "changed the qualifying requirements," when as a matter of fact a comparison of these two regulations will show, that the qualifying requirements were both the same *verbatim*. This estoppel is further fortified by the fact that he admittedly made no investigation (R. 175, 176, 177, 193, 194) although the evidence is undisputed that an investigation would have shown that Granite Falls Plan-

ing Mill was *qualified and entitled* to operate under S.S.R. 27 to M.P.R. 165 and M.P.R. 539 (R. 174, 234, 235, 237, 238).

Certainly a private individual could not hope to recover damages under the above facts, nor should an agency of the Government expect more.

In *U. S. v. Denver R. G. Ry.* (C.C.A. 8, 1926) 16 F.(2d) 374, which was a suit by the United States to forfeit a right-of-way, because of non-user, the court in discussion the question of estoppel said:

“The equitable claims of the State or of the U. S. are no stronger than those of an individual under like circumstances, and a state or the U. S. may waive a claim and be estopped from the assertion of a claim under circumstances that would estop an individual from the assertion of a similar claim.”

The estoppel in this case, is not one involving the construction of a regulation, but is one involving the application of the Golden Rule to the everyday affairs of men, based entirely on honesty and fair dealing.

VIII.

M. H. Wyman and Edward Doran Not Liable in Any Event

M. H. Wyman and Edward Doran were both ordered dismissed from this suit on February 15, 1946, on the ground that the action had abated as to them (R. 36). Notwithstanding this order, the O.P.A. filed a second amended complaint on February 27, 1946 (R. 39) after the statute of limitations had expired, making both of them parties defendant, and

judgment was entered "against the defendants and each of them in the sum of \$19,130.67" (R. 72).

This judgment, of course is controlling, and under it execution may be had against anyone of the defendants for the full amount, notwithstanding the statement of the trial judge that "No court would let such an execution stand" (R. 258).

Now since this action abated as to these two defendants, all rights against them likewise abated, which cannot be cured by amendment.

The abatement of an action is the entire overthrow or destruction of the suit. To sustain the plea is a dismissal of the suit.

Sweeney v. Greenwood Index Co. (D.C.S.C. 1941) 37 F. Supp. 484;

Geiger v. Merle (Ill. 1935) 196 N.E. 497;

In re Thomasson (Mo. 1942) 159 S.W.(2d) 626;

1 C.J.S. 29;

49 C.J. 244.

The trial court *seemed* to hold that service of a copy of the *original summons and complaint* on M. A. Wyman on July 13, 1944 was sufficient service on M. H. Wyman and Edward Doran the other two members of the partnership of Wyman Mill Co. We do not agree with that holding.

"A partnership does not exist in law apart from the individuals composing it."

Yarbrough v. Pugh (1911) 63 Wash. 140, 114 Pac. 918;

"It is a settled rule that in order to sue a

partnership each partner must be personally served with process."

Duncan v. Pearson (D.C., S.C., 1940) 35 F. Supp. 631;

Duncan v. Pearson (C.C.A. 4, 1943) 135 F. (2d) 146;

In re Gayle (C.C.A. 5, 1943) 136 F.(2d) 973;

Coughlin v. Pinkerton (1906) 41 Wash. 500, 84 Pac. 14.

The abatement of this suit as to M. H. Wyman and Edward Doran (R. 36) ended this action as to them in *every* capacity, and subsequent service on February 27, 1946 (R. 45) could not revive it.

Even if such service were effectual to hold M. H. Wyman and Edward Doran, the statute of limitations intervened in the meantime.

Nor was there any evidence even *remotely* connecting M. H. Wyman or Edward Doran with the violation of *any* regulation.

IX.

Appellants Motion for Non-Suit or Dismissal or New Trial Should Have Been Granted

We believe the pleadings and evidence together with the stipulations show:

1. That appellee changed the Cause of Action after the expiration of the one-year statute of limitations.

2. That appellee's figures of \$19,130.67 are erroneous.

3. That there is no evidence that appellants sold

any surfaced lumber or any other lumber, except rough lumber, which the evidence and stipulation both admit are in accordance with R.M.P.R. 26.

4. That the only testimony of fraud or overcharges by appellants, is the conclusion of *one* witness based solely on his imagination and admittedly without any facts.

5. That there is no evidence that appellants used Granite Falls Planing Mill to violate R.M.P.R. 26.

6. That appellee has failed to connect M. A. Wyman with the sale of any surfaced lumber.

7. That the evidence amounts to an estoppel against appellee.

8. That M. H. Wyman and Edward Doran were dismissed from this suit before trial, and the second amended complaint was not filed until after the expiration of the Statute of Limitations, and there is no evidence of the violation of any regulation by either of them.

For these reasons and the additional admitted facts, that no complaint was ever made by any of appellant's customers, or *any one else*, and the further fact that it would have cost the customer *more* than it did to have had this lumber planed elsewhere, and therefore no one has been injured; we believe the District Court erred in denying appellants' motions to dismiss the case at the close of appellees' testimony, and in failing to dismiss this case at the conclusion of the trial.

In fairness to the visiting trial judge, he let it be

known at the outset of the trial that he knew nothing about lumber (R. 115) and we believe because of that fact, he was grossly misled by the conclusions of Mr. Rothfield. The trial judge also stated at the conclusion of the trial, when he announced judgment against appellants in the sum of \$19,130.67, single the amount of the overcharges:

“If the Court could, it would render a judgment for a less amount of damages.” (R. 249).

This statement, we believe, dispels any idea of fraud.

Briefs for and against motions for new trial were submitted November 9, 1946, and a minute entry of the denial of these motions was not made until June 23, 1947 (R. 79).

These facts are merely mentioned to show that apparently the trial judge was not thoroughly convinced of the propriety of the judgment, or of his denial of appellants' motions for a new trial.

The following excerpt from the record (R. 109, 110, 111) we believe also shows surprise which ordinary prudence by appellants could not have guarded against:

THE COURT: The thing I want to know is this: The Second Amended Complaint charges you with the sale of lumber beyond the ceiling price—in excess of the ceiling price. It doesn't say how you did it, it doesn't indicate how you did it.

Now are you caught by surprise or are you not, when they offer to prove that your clients manipulated this thing through Granite Falls Planing Mill and thereby raised the price of lumber?

MR. HUGHES: Well, I will say this Your Honor, the last day or two I have been trying to figure out how they were going to prove it.

THE COURT: Did they ever tell you how they were going to prove it?

MR. HUGHES: No that was never gone into—how they were going to prove it.

THE COURT: I see nothing in this record that indicates that you were informed by any of the record. You came in and asked them to make that more definite and certain. Judge Bowen denied that promptly, and gave you your right of discovery—that you could pursue. If you were caught by surprise, if you didn't know that that was to be their method of proof, this Court will not permit them to prove it. In other words, if by this overall complaint, they have got you in here and you didn't know what the cause was, and if you would have filed a different answer in the action had you known that, the Court will not permit them to do it. Now if you had known that would you have filed a different answer from that which you did file?

MR. HUGHES: Why I think I would Your Honor. I would have to think it over, but I don't see how I could get by with the Answer I filed in the case and meet such a charge."

Now of course appellants' right to a discovery, could not possibly have elicited the fact that appellee intended to prove fraud at trial. Nor were appellants under any obligation to inquire of appellee how he intended to prove his case.

If the issues made up for the trial of a case are permitted to be radically changed at time of trial

without notice, then the pleadings become useless. The trial court as shown by the record permitted such a change, and in so doing, we believe it arbitrarily abused its discretion, resulting in a failure of justice to appellants.

It is, therefore, respectfully submitted, that the District Court erred in the respects pointed out herein, and the judgment should, therefore, be reversed.

Respectfully submitted,

C. E. HUGHES,
Attorney for Appellants.

No. 11701

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

M. A. WYMAN, doing business as
M. A. WYMAN LUMBER COMPANY;
M. A. WYMAN, M. H. WYMAN and
EDWARD DORAN, doing business as
WYMAN MILL COMPANY, and M. A. WYMAN,
Appellants,
vs.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE HOWARD C. SPEAKMAN, *Judge*

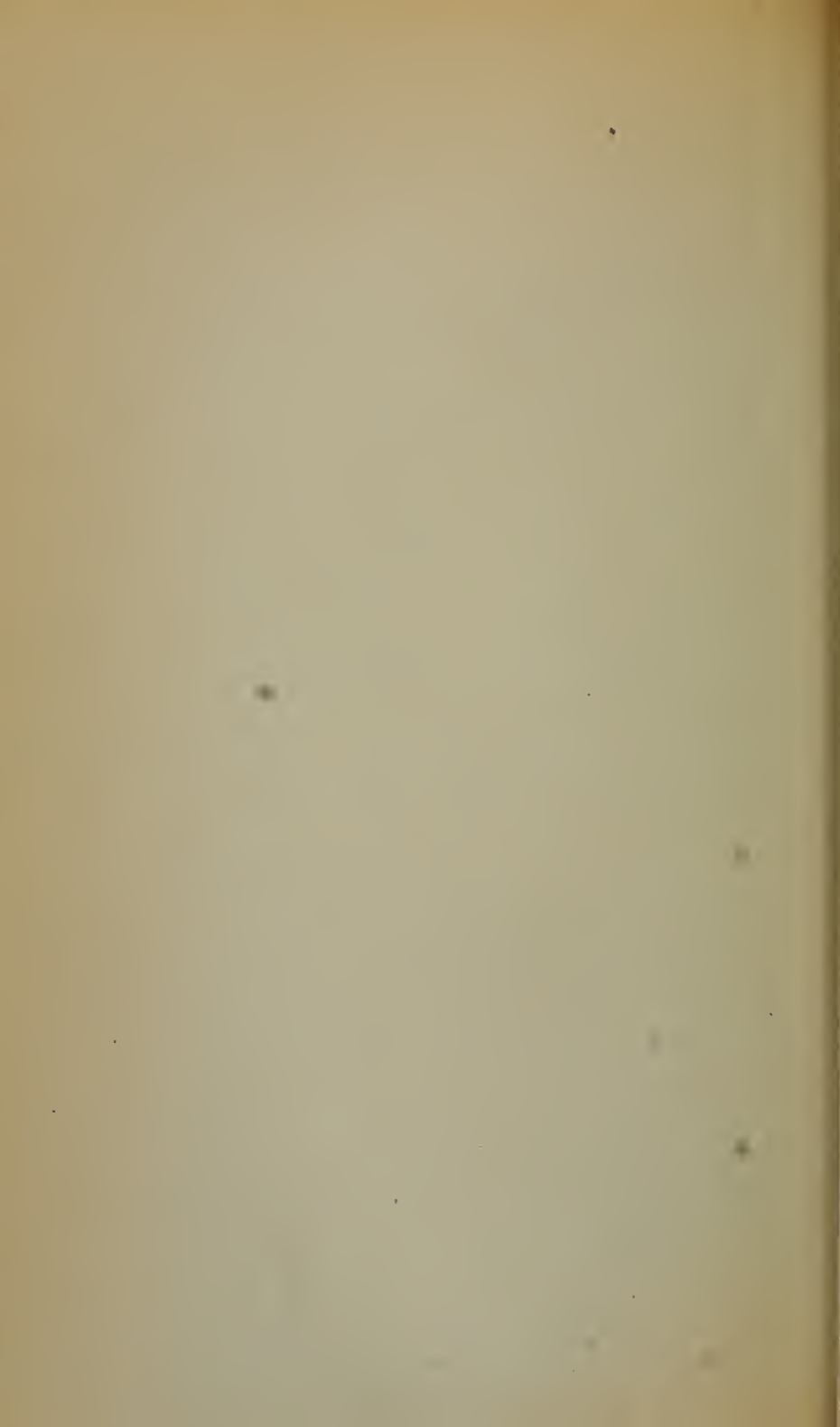
BRIEF OF APPELLEE

J. CHARLES DENNIS
United States Attorney

JOHN E. BELCHER
Assistant United States Attorney

OFFICE AND POST OFFICE ADDRESS:
1020 UNITED STATES COURT HOUSE
SEATTLE 4, WASHINGTON

NOV 17 1947



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IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

M. A. WYMAN, doing business as
M. A. WYMAN LUMBER COMPANY;
M. A. WYMAN, M. H. WYMAN and
EDWARD DORAN, doing business as
WYMAN MILL COMPANY, and M. A. WYMAN,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE HOWARD C. SPEAKMAN, *Judge*

BRIEF OF APPELLEE

STATEMENT OF THE CASE

This is an appeal from a judgment of the District Court for the Western District of Washington, Northern Division, Honorable Howard C. Speakman, visiting judge, presiding. The action was commenced in the name of Chester Bowles, Administrator, Office of

Price Administration, for alleged violations of the Emergency Price Control Act of 1942 (50 U.S.C. App. 901) as amended, seeking injunctive relief and treble damages for alleged overcharges in the sale of lumber.

Jurisdiction of the cause is conferred by the provisions of Section 205(c) of the Act as amended.

The violations alleged, set out in two counts in the amended complaint, consisted of practices on the part of appellants which it is alleged constituted violations of Maximum Price Regulation 539, covering custom milling and kiln-drying of Western softwoods (*9 Fed. Reg. 6152*), without special authorization from the Office of Price Administration (Section 4(b) MPR 539), which regulation was issued pursuant to Section 2(a), Section 2(b) and Section 201 (d) of the Price Control Act as amended.

It was also alleged and proved in and under the second count that the defendants from July 11 to and including December 22, 1944, owned and controlled a sawmill producing lumber of a species of Western softwood lumber covered by Revised Maximum Price Regulation 26 and also owned and controlled a "custom mill" selling and providing "custom mill" services on the lumber produced by the sawmill to purchasers for use in the course of trade or business, without securing authorization from the Office of Price Administration

to charge "custom milling" prices as set forth in Section 4(b) MPR 539 for such services, and that the total prices charged for said services and lumber were in excess of the maximum prices established by Table 2 RMPR 26 for lumber as delivered to the purchaser.

Before trial, Paul A. Porter was substituted for Chester Bowles (R. 54) and the cause proceeded to judgment in his name.

In its judgment (R. 72-3) the court dismissed the first count (seeking injunctive relief) but awarded single damages on Count II in the sum of \$19,130.67 with costs.

Motions for a new trial were interposed (R. 73-75) and denied (R. 79-81).

After judgment, the United States of America was substituted as party plaintiff (R. 85) after which notice of appeal was served and filed (R. 86).

There are thirteen assignments of alleged error (R. 92-93), but counsel argues only nine of them.

ARGUMENT

To a proper understanding of the case it is necessary first to know the provisions of the regulations alleged to have been violated, so we will set them out briefly herein:

Maximum Price Regulation 539 (9 Fed. Reg. 6152) was authorized under the provisions of Section 2 (a), Section 2(b) and Section 201(d) of the Price Control Act, 50 U.S.C. App. 921, and inter alia provides:

Sec. 1. *Sales of custom milling or custom kiln drying services on Western softwood lumber at higher than maximum prices prohibited.* (a) On and after June 5, 1944, no person shall sell or provide, and no person shall buy or receive in the course of trade or business, custom milling or kiln drying services on Western softwood lumber, at prices higher than the maximum prices set by this regulation; and no person shall agree, offer, or attempt to do any of these things.

Sec. 2. *What is Western softwood lumber?* "Western softwood lumber" under this regulation means any lumber which on sales by the sawmill is subject to RMPR 26 (Douglas Fir and other West Coast Lumber). * * *

Sec. 3. *What is "custom milling" service?* Under this regulation "custom milling" means only the operations specifically included under Section 12 performed, as a service for others, upon lumber in which the person performing these services has no financial interest. (39:3991 OPA Service.)

Sec. 4. *What is a "custom mill?"* Even though the services you may perform may meet the definition of "custom milling" above, this regulation does not apply to you unless you qualify as a "custom mill" under this section.

(a) *General.* A "custom mill" is one which performs "custom milling" services upon lumber sub-

ject at mill level to RMPR 26 * * * and which:

(1) Does not operate a "mill" under the definitions contained in RMPR 26 * * *.

(2) *Does not own or control, is not owned and controlled by and is not under common control with "mill" producing the species covered by RMPR 26 * * * wherever located.*

(b) *Operation not qualifying under paragraph*

(a) *may get special permission.* If you do not qualify as a "custom mill" under paragraph (a) above, you may under certain special conditions get authority to operate under this regulation. The rules covering this are as follows:

(1) An application must be filed with the OPA Regional Office nearest the operation. This application must show:

(Then follows four requirements.)

(2) Special authorization under paragraph (b) will be granted only where the application enables the Regional Office to make findings that the authorization:

(i) Will result in greater production of surfaced boards or dimension or kiln dried lumber. * * * (39:3992 OPA Service.)

Sec. 9. *Enforcement.* Persons violating any provision of this regulation are subject to the criminal penalties, civil enforcement actions, suits for treble damages, and proceedings for suspension of licenses provided by the Emergency Price Control Act of 1942 as amended.

* * *

Sec. 12. *Maximum prices.* The maximum prices per one thousand feet board measure for "custom

milling of lumber which on mill sales is subject to RMPR 26 * * * shall be as follows:

(Here follows Tables 1 and 2.) (39:3994 OPA Service.)

Maximum Price Regulation 26, as amended (9F. R. 1016, 3513, 4227, 7505, 9720, 11,112, 12,537; 10F.R. 4661, 5099, 5323) provides, inter alia:

“Article II. Maximum prices and terms of sale.
Sec. 5. *Basic prices and cash discount.* (a) Basic prices. The maximum prices f.o.b. mill are set forth in Article V—Price Tables.

Sec. 7. *Sales on delivered basis.* (a) Rail charges. (1) Only two methods of selling are recognized by this regulation. Any other method is prohibited, as a device to evade the ceiling by manipulation of freight.

The two permitted methods are: On a delivered basis using the estimated weights in Article VII or on an f.o.b. mill basis with actual freight (figured of course on actual weights) to be paid by the purchaser.

The two methods may not be combined in a single transaction; that is, a seller may not sell on a basis which gives him the benefit of favorable estimated weights, but require the use of actual weights on items where estimated weights would be unfavorable to him. * * *

Sec. 16. *Prohibited practices.* (a) General. Any practice which is a device to get the effect of a higher-than-the-ceiling price without actually raising the dollars-and-cents price is as much a violation of this regulation as an outright over-ceiling price. This applies to changes in credit practices and cash discounts and to devices mak-

ing use of commissions, services, transportation arrangements, premiums, special privileges, tying agreements, trade understandings and the like." (Italics ours.)

*Article V—Price Tables—*Sec. 23—shows the maximum ceiling prices for different sizes S4S of Douglas Fir Lumber, too lengthy to set out herein.

The sales in question were made between July 11, 1944, and December 22, 1944, and Table 2 of Sec. 23 of Article V of RMPR 26 was amended by Amendment 5 issued January 26, 1944, and effective February 1, 1944 (9F.R. 1016).

Table 2 was not again amended until May 4, 1945, by Amendment 13 (10F.R. 5099). Thus the table that controls the sales here involved is contained in Amendment 5.

Exhibit "A" attached to the amended complaint sets out in detail all sales made by appellants from July 11, 1944, to December 22, 1944, showing the purchasers, date of purchase, amount collected, the ceiling price, and the amount of overcharge in each instance, all aggregating the sum of \$19,130.67. (R. 21-23).

The allegations contained in paragraphs 1, 2, 3, 4 and 5, Count I of the amended complaint were adopted in paragraph 1 of Count II and made a part

thereof by reference and without repetition. (R. 17).

It was alleged (R. 15) and proved (R. 228) that the Granite Falls Planing Mill, Inc., was engaged in the business of milling Western softwood lumber, and that the principal officers and stockholders of said corporation from July 11, 1944, to December 22, 1944, were M. A. Wyman, M. H. Wyman and Edward Doran (paragraph V. amended complaint). After alleging in paragraph 6(A) (R. 16) that defendants were engaged in acts and practices thereafter described which constituted a violation of MPR 539—Custom Milling and Kiln Drying of Western Softwoods (9F.R. 6152) (sub-paragraphs B and C of paragraph 6 (R. 16) of the amended complaint) it was further alleged in sub-paragraph D as follows (R. 17):

“That the defendants, from July 11, 1944, to and including December 22, 1944, owned and controlled a sawmill producing lumber of a species of Western softwood lumber covered by RMPR 26, and *also owned and controlled a “custom mill” selling and providing “custom mill” services on lumber produced by the sawmill to purchasers for use in the course of trade or business. That the defendants did not secure authorization from the Office of Price Administration at its Regional Office in San Francisco to charge “custom milling” prices as set forth in MPR 539 for such services, and that the total prices charged for said services, and lumber were in excess of the maximum prices established by*

RMPR 26 for the lumber as delivered to the purchaser."

The stipulation of the parties (R. 62-65) is as follows:

"3. Maximum Price Regulation 539 *is a service regulation* covering maximum prices for surfacing and kiln drying lumber. And Revised Maximum Price Regulation 26 *is a commodity regulation establishing maximum prices for the sale of a species of lumber known as Douglas Fir* and other West Coast lumber. (R. 62).

5. M. A. Wyman was the principal owner and manager of the M. A. Wyman Lumber Company, White-Henry-Stuart Building, Seattle, Washington, from July 10, 1944, to and including December 22, 1944. (R. 63).

6. M. A. Wyman, M. H. Wyman and Edward Doran, as co-partners, were operating the Wyman Mill Company, located at Granite Falls, Washington, for the above-mentioned period.

7. M. A. Wyman during the period mentioned in paragraph 5, hereof, was a 50% stockholder and president of the Granite Falls Planing Mill, a corporation, with its operation located near Granite Falls, and said corporation had a representative in the office of the Wyman Lumber Company, in Seattle, Washington. That the M. A. Wyman, mentioned in paragraphs 5 and 6, hereof and also as president of the Granite Falls Planing Mill, is one and the same person. R. 63).

8. That Granite Falls Planing Mill during 1944 was located within 500 feet of the Wyman Mill Company. (R. 63).

9. That Edward Doran was superintendent of

the Wyman Mill Company and the Granite Falls Planing Mill during 1944. (R. 63).

10. That the Granite Falls Planing Mill bought the surfacing machinery from the Wyman Mill Company, and also occupied space which, prior to its incorporation, had been occupied by a portion of the Wyman Mill Company. (R. 64).

11. The M. A. Wyman Lumber Company sold, shipped, invoiced and received payment for 3,122,732 feet board measure of rough lumber from July 10, 1944, to and including December 22, 1944. That these figures were obtained from invoices, the originals of which are now within the possession of the defendants, herein, and which footage is further shown in Exhibit "A" appended to plaintiff's Second Amended Complaint. That it received payment for this lumber in the sum of \$89,427.38. That said latter sum is in accordance with the prices set forth in RMPR 26. (R. 64).

12. The Granite Falls Planing Mill invoiced and received payment in the sum of \$22,955.44 for surfacing charges on 3,122,732 feet board measure of lumber from July 10, 1944, to and including December 22, 1944, *being the same lumber mentioned in paragraph 11.* That these figures were obtained from invoices made out in the offices of the M. A. Wyman Lumber Company, White-Henry-Stuart Building, Seattle, Washington, the originals of which are now in the possession of the defendants herein, and which footage is further shown in Exhibit "A" appended to plaintiff's Second Amended Complaint. (R. 64).

13. During this period with respect to all of these shipments heretofore mentioned, a representative of the Granite Falls Planing Mill, using the office of the Wyman Lumber Company, made

out the Bills of Lading for the surfaced lumber providing for shipment of said lumber from the Granite Falls Planing Mill to the various customers, *showing the M. A. Wyman Lumber Company as shipper*. That such procedure was customary at said time. (R. 64-65).

14. The invoices for rough lumber, the invoices for surfacing, and Bills of Lading all bear the same date for each shipment, and the footage for the rough and surfaced lumber is the same in each case. (R. 65).

15. All sales concerned in this suit were made to purchasers who operated retail or wholesale lumber yards and were for use in the course of said purchaser's business." (R. 65).

Supplementing this stipulation is the testimony of Joseph Rothfield (R. 122), Edward Doran (R. 111), William C. Wurnsted (R. 181) and M. A. Wyman (R. 208).

Appellants offered no evidence to contradict any of appellee's witnesses, being content to rest their case upon the cross-examination of witnesses called on behalf of appellee, so that there is no dispute in the essential facts.

The overcharges, according to the undisputed testimony given by the witness Joseph Rothfield, were \$19,129.09. (R. 136).

This amount of overcharge is best explained by the witness Rothfield. (R. 135).

Q. What is that amount?

A. Do you mean the difference?

Q. Yes.

A. \$19,129.09.

The Court: That represents what?

The witness: The over-the-ceiling charge.

The Court: You say that represents the over-charge?

The witness: Yes.

The Court: Now what do you mean by "over-charge"?

The witness: The difference in the price of the rough lumber and the surfaced lumber under Table 26. The rough lumber is billed correctly \$89,427.38; and the identical lumber for surfacing S-4-S is billed \$22,955.44, whereas under Table 26 the surfacing of that same lumber is \$3826.35; so therefore you deduct the \$3826.35 from the \$22,955.44. You have an overcharge of \$19,129.09. (R. 136).

Exhibit "A" attached to the amended complaint (R. 20-22) gives the detailed list of purchasers, the

amount collected from each, the ceiling price and respective amounts of overcharge aggregating a total of \$19,129.09, which is nowhere disputed by appellants.

Another way of expressing it would be to say, you take the rough lumber, \$89,427.38, and add to it \$22,955.44—*the charge made for surfacing*, and you have a total of \$112,382.82. It being conceded that the charge of \$89,427.38 for the rough lumber is in accordance with the regulations, you then add *the ceiling price for surfacing* as provided for in RMPR 26, of \$3826.35, gives a total of \$93,253.73. By deducting \$93,253.73 from \$112,382.82, we find an overcharge of \$19,129.09. The trial court was right in awarding judgment in that sum and its judgment should be affirmed.

ARGUMENT

In Answer to Appellants

I

Appellant claims that the second amended complaint (R. 39), introduced a new and different cause of action than that stated in the original (R. 2) and first amended complaints (R. 14), and therefore the action is barred by the provisions of Section 205(e) of the Emergency Price Control Act (50 U.S.C. App., Section 925e), as not having been commenced within one year.

It is difficult to follow counsel on this assignment because an examination of all three complaints (R. 2, 14, 39) shows that the violations alleged consisted of acts and practices in contravention to the provisions of RMPR 26 and MPR 539.

The case of *Salyers v. United States*, 257 F. 255, cited by appellant, hardly seems apt. There, the second amended complaint did introduce a new cause of action. An action on an assigned claim not included in the original complaint against which the statute of limitations had already run when the second amended complaint was filed. Here, however, no new cause of action has been introduced. In the original and amended complaints a corporate defendant was joined. This corporation was owned and controlled by the individuals constituting the other defendants named. It was through the medium of this corporation, which did the surfacing of the rough lumber supplied by the individual defendants, that appellants were, or thought they were, enabled to charge the over-the-ceiling prices which were charged.

We have heretofore set out herein the provisions of MPR 539 and RMPR 26 (pp. 4 to 7 herein) and it is because of the financial interest of the appellants in the corporation which did the surfacing, alleged in all three of the complaints and testified to at the trial,

that we assert it cannot be successfully contended that there has been any change whatever in the cause of action. Therefore the defense of the statute of limitations was properly overruled and denied by both Judge Bowen (R. 57) and Judge Speakman (R. 249). The authorities cited and relied upon by appellant therefore have no application to the instant case.

II

Appellants, as their second point, assert that RMPR 26 fixes no prices for services to lumber.

An examination of this regulation, as set out at p. 6 hereof, refers to price tables contained in Article V thereof. By Section 16 of this regulation it is provided:

“Any practice which is a device to get the effect of a higher-than-ceiling price without actually raising the dollar-and-cents price is as much a violation of this regulation as an outright over-ceiling price. This applies to * * * devices making use of * * * services * * * trade understandings and the like.”

Article V, Price Tables, Section 23, shows the maximum ceiling prices for different sizes and descriptions of Douglas Fir Lumber.

By billing their customers for rough lumber only, and having this “dummy” corporation (Granite Falls Planing Mill) bill the customer for the surfacing of this rough lumber separately, they were enabled to

secure a higher price. Although the shipments were made by the corporation, the consignor or shipper was the Wyman Lumber Company (Stip. par. 13 R. 64-5), definitely indicating that the business was that of the appellants beyond the slightest doubt.

The intent of appellants is clearly demonstrated by their application, under the provisions of Section 4(b) of MPR 539 or its predecessor, SSR 27-MPR 165, in filing the application Exhibit A-2 (R. 172) for authority to operate under that regulation, and continuing to do so notwithstanding that authority had not been granted. It was later refused (R. 196).

III

Appellants' next contention is that there is no evidence that appellants sold any surfaced lumber, and that the trial court's finding, No. VI, finds no support in the evidence.

This argument is without the slightest merit. The stipulation (R. 62) and the evidence of the witness Rothfield (R. 122), clearly shows that the appellants, through the use of a dummy corporation, and without authority first having been obtained from the Office of Price Administration, as required by regulation MPR 539, attempted to obtain, and did obtain, through the medium of a corporation in which they

had a substantial financial interest, prices in excess of the ceiling prices for this lumber. The only inference that can possibly be drawn from the undisputed evidence is as found by the trial court. This brings us back to the all inclusive Section 16 of RMPR 26, which reads:

*"Any practice which is a device to get the effect of a higher-than-ceiling price * * * is as much a violation of this regulation as an outright over-ceiling price. This applies to * * * devices making use of * * * services * * *."*

And the trial court was right in making the finding complained of.

IV

The next contention is that none of the complaints alleged fraud or deceit, and it is therefore claimed that the court erred in admitting, over objection, the testimony of the witness Rothfield (R. 104, 113, etc.).

It is somewhat difficult to follow counsel's argument on this point.

The plain allegations of the second amended complaint are that appellants *"were engaged in the acts and practices hereinafter described, which constituted a violation of Revised Maximum Price Regulation 26."*

Paragraph 4 of Count 2 alleges:

“That the defendants, being sellers subject to said regulation, made numerous sales from July 11, 1944, to and including December 22, 1944, to purchasers for use of consumption in the course of trade or business at prices in excess of the maximum prices fixed by the regulation, which sales are set forth in Exhibit “A,” which is affixed hereto and made a part hereof by reference as fully as if set forth herein. The amount by which the prices charged by the defendants exceeds the maximum prices provided under RMPR 26 is \$19,130.89.”

No motion having been made by appellants to make the second amended complaint more definite and certain and no bill of particulars having been demanded (at least the record is barren of such a motion or demand), we submit that appellee could prove these allegations by any method it might see fit.

The following appears in the record at page 110:

“*The Court*: Pardon me, Mr. Hughes, I am sorry to interrupt you. Let’s don’t argue that. (Regulation MPR 165).

“The thing I want to know is this: The second amended complaint charges you with the sale of lumber beyond the ceiling price—in excess of the ceiling price. It doesn’t say how you did it, it doesn’t indicate how you did it.

“Now, you are caught by surprise or are you not when they offer to prove that your clients manipulated this thing through the Granite Falls Planing Mill and thereby raised the price of lumber?”

Mr. Hughes: Well, I will say this, your Honor: The last day or two I have been trying to figure out how they were going to prove it.

The Court: Did they ever tell you how they were going to prove it?

Mr. Hughes: No, that was never gone into—how they were going to prove it.

The Court: I see nothing in the record that indicates that you were informed by any of the record. You came in and asked them to make that more definite and certain. Judge Bowen denied that promptly and gave you your right of discovery—that you could pursue that. If you were caught by surprise—if you didn’t know that that was to be their method of proof, this Court will not permit them to prove it. In other words, if by this overall complaint they have got you in here and you didn’t know what the cause was, and if you would have filed a different

answer in this action had you known that, the Court will not permit them to do it.

Now if you had of known that, would you have filed a different answer from that which you did file?

Mr. Hughes: Why, I think I would, your Honor. *I would have to think it over*, but I don't see how I could get by with the answer I filed in the case and meet such a charge." (R. 111).

In the printed record the colloquy between counsel and the Court is abruptly ended at page 52 of the transcript of proceedings at the trial (R. 111). So that to give this Honorable Court the benefit of the balance of this colloquy and the remarks of other counsel in the case we will have to leave the printed record and revert to the typewritten transcript of proceedings at trial. Commencing at line 23, page 52 of that record, we find the following:

The Court: What do you gentlemen say?

Mr. Hitchcock: I might say briefly—Mr. Porter has been dealing with Mr. Wyman—however, there are one or two things I would like to state.

If the court will note by the record that the de-

fendants were specifically informed by interrogatories of the overcharges on which we base our case.

The Court: That is where you refer to—

Mr. Hitchcock: I refer to the exhibits. * * *
(Tr. p. 53).

Mr. Porter: (Tr. p. 54). In answer to Mr. Hughes' interrogatories, I have stated in there exactly which table should have been used on 2x4s, which table should have been used on planks and which table should have been used on small timbers, and which table should have been used on large timbers. In addition to that, I have been in his office on three different occasions. I took the invoice—that expressed the amount of (Tr. 55) rough timber that was billed out by M. A. Wyman Lumber Company. I put right beside it the invoice for surfacing, and right beside that the bill of lading,—all one transaction; and yet he insists that we are springing surprise on him."

The Court: (Tr. p. 59). Well, go ahead, call your first witness.

It is respectfully submitted there is no merit in this assignment.

V

Under this assignment it is stated that the trial court erred in its finding XVI (R. 70).

The evidence in support of this finding is overwhelming when all of the facts and circumstances are calmly considered.

First, we find that the Granite Falls Planing Mill was organized by these defendants as a corporation, M. A. Wyman being its President, having a 50% interest therein (R. 63).

Second, M. A. Wyman was the principal owner and manager of M. A. Wyman Lumber Company.

Third, M. A. Wyman, M. H. Wyman and Edward Doran, as co-partners were operating to Wyman Mill Company, located at Granite Falls, Washington. (Stip, par. 6, R. 63).

Fourth, M. A. Wyman Lumber Company sold, shipped, invoiced and received payment for the rough lumber. (Stip. par. 11, R. 64).

Fifth, Granite Falls Planing Mill invoiced and received payment surfacing charges. (Stip. par. 12, R. 64).

Sixth, the finished (surfaced) lumber was shipped to various customers by Granite Falls Planing Mill, but M. A. Wyman Lumber Company was named in the bills of lading as shipper. (Stip. par. 13, R. 65).

This clearly ties all of these parties into "a device to get the effect of a higher-than-ceiling price," in plain violation of Section 16 of RMPR 26, set out at pp. 6-7 herein, and the only inference that could logically be drawn from these facts is epitomized in the trial court's finding XVI (R. 70).

The finding, therefore, is sustained by the overwhelming evidence in the case.

VI

On this point it is argued by appellant that an officer of a corporation is not personally liable for the acts of the corporation. This is axiomatic.

In this case appellee did not seek, and the trial court did not attempt, to hold anyone individually responsible for the acts of the corporation.

The theory upon which the action was based and appellants were held liable in damages by the trial court was the use they made of this "dummy" corporation in securing higher-than-ceiling prices for their lumber, without securing prior authority by this

corporation, which was wholly owned by them, from the Regional Office of the Office of Price Administration, under the proceedings of Section 4(2) (b) of MPR 539 (see p. 4 herein) and nothing more.

It cannot be successfully disputed, from a fair consideration of all of the evidence, that this "dummy" corporation was a "device making use of 'services'" prohibited by the express terms of Section 16 RMPR 26.

In a proper case, we have no quarrel with the authorities cited by appellants, but assert those rules have no application here.

This action is one against appellants, doing business as M. A. Wyman Lumber Company, and as Wyman Mill Company for their use of the Granite Falls Planing Mill (which they owned), which enabled them to secure "higher-than-ceiling prices" for their lumber, the Regulation (Section 16 RMPR 26) expressly providing:

"Any practice which is a device to get the effect of a higher-than-ceiling price * * * is as much a violation of this regulation as an outright over-ceiling price."

VII ESTOPPEL

Appellants make an elaborate argument on this

point, but neglect to point out wherein such defense, even if available against the sovereign, has been pleaded.

Such a defense is not available as against the United States, which has, from the inception of this case, been the real party in interest.

The United States is neither bound nor estopped by acts of its officers or agents.

United States v. City and County of San Francisco, 106 F. (2d) 569;

Korman v. Federal Housing Administrator, 113 F. (2d) 743;

United States v. Stewart, 121 F. (2d) 705.

In any event, the Regulation requires that authority must be granted, as a condition precedent to the right and the very fact that the authority was *not granted*, regardless of the fact that the application was eventually denied, militates against rather than in favor of the contentions of appellants.

VIII

It is argued under this point that M. H. Wyman and Edward Doran were both dismissed from this suit on February 15, 1946 (R. 36).

We quote the order:

"It is further ordered and adjudged that M.

W. Wyman and Edward Doran, defendants above named, be and they are hereby dismissed from said suits *as individuals.*”

At the time the trial court signed the findings, conclusions and judgment, the record (R. 256-7) shows this:

Mr. Ogden: If your Honor please, Mr. Hughes did not mention any objection to the conclusions of law and I think that very clearly, paragraph 2 should be changed. That paragraph reads:

‘Plaintiff is entitled to judgment against the defendants and each of them in the sum of \$19,130.67 and his costs herein.’

I believe it should be interlined in there saying, ‘but not in their individual capacity,’ because otherwise it is stated, ‘and each of them,’ and they are named as individuals at the top in the heading to the case and I don’t see how Mr. Doran as an individual would be protected unless that was interlineated in there.

Mr. Hughes: I had not gotten to the conclusions yet, but it does seem to me, in view of the fact that those two defendants, M. H. Wyman and Edward Doran, have been dis-

missed from the suit, that the judgment should not be against them; that the only defendant now in the case is M. A. Wyman.

The Court: It cannot be against them in an individual capacity because they have been dismissed.

Mr. Hitchcock: That is right as to their individual capacity."

Of course, these appellants were all partners in the two companies doing business under the trade names M. A. Wyman Lumber Company, and Wyman Mill Company.

Orders (for lumber) came for the Wyman Mill Company (Doran testimony R. 114):

"Q. Will you describe to the Court the exact procedure involved during this period, July to December, in producing say, a rough dimension in the Wyman Mill; just describe how that lumber was produced.

* * *

A. Well, first orders came in for the Wyman Mill Company. They came in in the rough. Then we would get that order in the rough. Then we would get orders from the customer that wanted lumber to the Granite Falls

Planing Mill authorizing us to go ahead and resurface and plane and saw and remark and grade and load the lumber." (R. 115).

* * *

"Q. (By Mr. Hitchcock) Who produced this rough lumber you are speaking about; wasn't that the Wyman Mill Company?

A. Wyman Mill Company produced some of it and we bought a tremendous lot of lumber. We bought from a large number of mills throughout the war that had no planers, and we planed it and sold it on the market. (R. 116).

* * *

The Court: Did I understand you to say that you were a partner in the Wyman Mill Company?

The witness: I was a partner in this way: I was hired on a salary and I participated in the company." (R. 117).

It was stipulated (R. 144) that M. A. Wyman was the owner of 50 per cent of the stock in the Granite Falls Planing Mill, and that Edward Doran and M. H. Wyman each owned 60 shares of the capital stock of that corporation.

The M. A. Wyman Lumber Company, which, so

far as the record is concerned, was in the sole ownership of M. A. Wyman. This trade name was used as the shipper on the Bills of Lading covering all of the shipments shown on Exhibit "A" attached to the amended complaint. (Stip. par. 13, R. 64-5).

Thus, we have all of the defendants named in the second amended complaint properly before the court, M. A. Wyman, individually and doing business as M. A. Wyman Lumber Company, and M. A. Wyman, M. H. Wyman and Edward Doran, as co-partners doing business as Wyman Mill Company.

Each partner is liable, under the law, for the acts of the other partner and clearly it is in this capacity that each appellant is liable.

The statutes of the State of Washington relating to process and procedure will be found in *Remington's Revised Statutes, Section 236*, which reads:

"When the action is against two or more defendants and the summons is served on one or more but not on all of them, the plaintiff may proceed as follows:—

"1. If the action is against the defendants jointly indebted upon a contract, he may proceed against the defendants served unless the court otherwise directs; and if he recovers judgment it may be entered against *all the defendants thus jointly indebted* so far only as it may be enforced against the joint property of all *and the separate property of the defendants served.*"

Livingstone v. Lovgren, 27 Wash. 102, 67 Pac. 599;

Peha's University Food Shop v. Stimpson Corporation, 177 Wash. 406, 31 Pac. (2d) 1023.

As a parting shot, on this point counsel says (Br. p. 36): "Nor was there any evidence even *remotely* connecting M. H. Wyman or Edward Doran with the violation of *any* regulation." This, of course, is not the fact.

Doran, for instance, was not only a partner in the Wyman Mill Company, but was also "superintendent" (R. 112). He testified his duties as superintendent consisted of buying logs for the mill (Wyman Mill Company) and supervising the operation of the mill (R. 113). He was also a stockholder in the Granite Falls Planing Mill (R. 144).

The stipulation (R. 62) clearly negatives the assertion made by counsel.

IX

The ninth point argued by appellants deals with their motion for a new trial, and raises nothing new.

Merely because counsel did not know how appellee intended to prove its case against his clients is no reason for the claim that the cause of action had been changed.

There was no change of issues of any kind. If counsel claimed surprise, he had the right to a continuance, and not having asked a continuance, his clients are now bound by the judgment as entered.

There being no error in the record, it is respectfully submitted that the judgment should be in all things affirmed.

Respectfully submitted,

J. CHARLES DENNIS
United States Attorney

JOHN E. BELCHER
Assistant United States Attorney



IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

M. A. WYMAN, doing business as M. A. WYMAN
LUMBER COMPANY; M. A. WYMAN, M. H.
WYMAN and EDWARD DORAN, doing business
as WYMAN MILL COMPANY, and M. A. WYMAN,
Appellants,

vs.

UNITED STATES OF AMERICA, *Appellee.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE HOWARD C. SPEAKMAN, *Judge*

REPLY BRIEF OF APPELLANTS

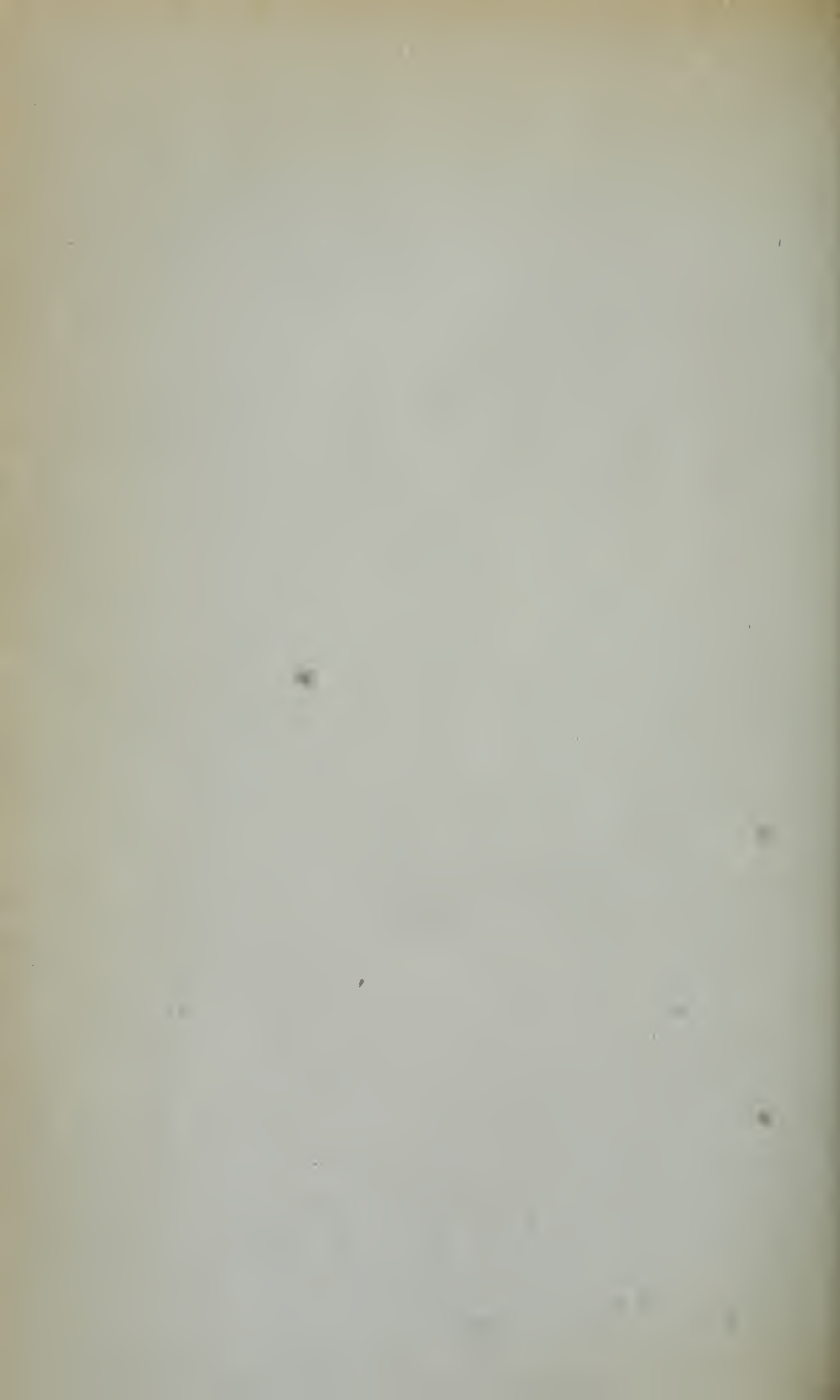
C. E. HUGHES,
Attorney for Appellants.

Office and Postoffice Address:

1026 Henry Building,
Seattle 1, Washington.

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IN THE
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LUMBER COMPANY; M. A. WYMAN, M. H.
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IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

M. A. WYMAN, doing business as M. A. WYMAN LUMBER COMPANY; M. A. WYMAN, M. H. WYMAN and EDWARD DORAN, doing business as WYMAN MILL COMPANY, and M. A. WYMAN, <i>Appellants,</i>	}	No. 11701
vs.		
UNITED STATES OF AMERICA,	}	<i>Appellee.</i>

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE HOWARD C. SPEAKMAN, *Judge*

REPLY BRIEF OF APPELLANTS

Appellants had hoped, that it would not be necessary to file a Reply Brief in this case, but due to the many inaccuracies in Appellee's brief, which may be attributed to the fact that the present counsel for Appellee had no part in the proceedings herein, prior to the notice of appeal, and are therefore, unfamiliar with the pleadings and evidence in this case; we deem it necessary to clear up each of these inaccuracies as they appear in appellee's brief, in order that this

Court may know all the pertinent facts pertaining to the law involved in each of appellant's specification of errors.

Appellee says (pp. 1 and 2) that this action was commenced to recover treble damages "for alleged overcharges in the *sale of lumber*." It was commenced to recover treble damages (We omit the injunctive counts which were dismissed) for failure to obtain "authorization," in accordance with Maximum Price Regulation 539 (Count III, R. 6) and to recover for certain alleged overcharges for trucking, in accordance with Revised Maximum Price Regulation 26 (Count IV, R. 7). Appellee dismissed the trucking charge count, and then filed an *amended* complaint seeking treble damages for failure to obtain "special authorization as provided in MPR 539 (Count II, R. 17), a service regulation, which fixes prices for *services* to lumber. RMPR 26 is nowhere even mentioned in Count II (the damage count) of the amended complaint. So at that point in the controversy, the *only* violation alleged was failure to obtain special authorization as provided in MPR 539.

This amended complaint was aimed at Granite Falls Planing Mill, a corporation, the *only* defendant alleged to be engaged in planing or services to lumber. Granite Falls Planing Mill, M. H. Wyman and Edward Doran were dismissed from the amended complaint February 15, 1946, and *all the pleadings thereafter omitted* this corporation, and M. H. Wyman and Edward Doran as individuals.

It should be noted here, that the printed record (by

mistake of the printer) has failed to show this omission. They are *not* parties to this suit, and the pleadings so show.

Appellee (p. 2) refers to the allegations and proof of the *amended* complaint. This case was not tried on the amended complaint, but was tried on the second amended complaint (R. 39), which latter contains no such allegation as appellee claims.

Appellee states (p. 3) that "There are thirteen assignments of error, but counsel argues only nine of them." There are only eleven assignments of error (pp. 14 to 16, appellants' brief) and they were all argued. The ninth and tenth, however, were covered in the argument under the first eight specification of errors.

Appellee (pp. 4, 5 and 6) discusses at length certain provisions of MPR 539. For what purpose it does not appear, since Count II, the damage count, of the second amended complaint on which this case was tried, contains no reference to that regulation.

Appellee again (p. 7) refers to the *amended* complaint and (p. 8) states that it was "alleged that Granite Falls Planing Mill, Inc., was engaged in the business of *milling* western softwood lumber * * * which constituted a violation of MPR 539," and quotes the amended complaint at length, for what purpose does not appear.

Appellee says (p. 11) that "appellants offered no evidence to contradict any of appellee's witnesses," and that "there is no dispute in the essential facts."

Now, appellants' brief (p. 7) definitely stated the

pages in the record refuting that statement, and appellee has in no way challenged the testimony referred to in appellants' brief. Such general statements by appellee, without any reference to the record deserve small consideration.

Appellee states (p. 11) "the overcharges according to the undisputed testimony given by the witness, Joseph Rothfield, were \$19,129.09. RMPR 26 itself refutes that statement.

Mr. Rothfield testified, that RMPR 26 establishes maximum prices for surfacing (planing) lumber (R. 124, 125, 126, 151, 152, 165) and that his calculation of \$19,129.09 overcharges for services in *planing* this lumber is based on RMPR 26, Table 2 (R. 124, 130, 131, 132, 179, 180).

We challenged counsel (p. 26, appellant's brief) to disprove our statement, that "all lumber services, including planing are covered *only* by MPR 539."

Appellee (p. 12) attempts to show *how* Mr. Rothfield arrived at \$19,129.09. He takes \$22,955.44, the amount received by Granite Falls Planing Mill, Inc., for planing this lumber, and deducts \$3,826.35 from that sum which leaves \$19,129.09. *But where does he get the \$3826.35?* Appellee didn't tell us, nor did Mr. Rothfield *ever* tell us, because RMPR 26 *fixes no price for planing lumber*. Therefore, Mr. Rothfield's computation of overcharges for *planing* lumber, based on RMPR 26 is erroneous.

Appellee, however (p. 13) attempts to express the alleged overcharges in "another way." But where does *it* get the \$3826.35, and *where* does RMPR 26

provide any ceiling price for surfacing or planing lumber? Mr. Rothfield was unable to answer these questions (R. 151, 152).

True, RMPR 26 fixes the ceiling price for the sale of rough lumber and a higher price for the sale of planed or surfaced lumber, but the difference between these two figures is *not* the ceiling price for planing services. The ceiling price for services in planing lumber is fixed *only* by MPR 539, the regulation issued and in force for that purpose, and *used by appellants*.

Appellee says (p. 14) that all three complaints alleged violations of MPR 539 and RMPR 26. We cannot understand why appellee could be so careless with the facts, when an inspection of Count II of the second amended complaint, the only count now involved in this action, contains *no mention or even a reference to MPR 539*.

Appellee says (p. 16) that appellants' application to operate under MPR 539 was "refused." That is incorrect. In the first place, *appellants* never made any application to operate under MPR 539. The application was made by Granite Falls Planing Mill, Inc., but it was not refused. It was merely *returned* to the applicant (R. 196, 197) after the O.P.A. had kept it for over a year (R. 194 and 195) without any investigation (R. 175, 176, 177, 193, 194), knowing that in the *meantime* the applicant was operating under MPR 539 (R. 203, 235); and the evidence is *uncontradicted* that it was qualified and entitled to operate under MPR 539 (R. 174, 234, 235, 237, 238).

Their only excuse for returning this application was that MPR 539 "changed the qualifying requirements" of SSR 27 to MPR 165 (R. 196) when as a matter of fact a comparison of these two regulations will show that the qualifying requirements were *both exactly the same word for word* (R. 205, 206, 235, 236).

We believe the evidence clearly shows that this conduct of the O.P.A. is grossly unfair, and amounted to an estoppel.

Appellee says (p. 16) that the stipulation and evidence show that appellants sold surfaced lumber, but fails to mention *where* it may be found, either in the *stipulation or evidence*. As a matter of fact, the stipulation admits that *appellants* sold only rough lumber (R. 64) and that Granite Falls Planing Mill surfaced, invoiced and received payment for its services in planing this lumber. Such a sweeping statement by appellee cannot be justified by the record.

Appellee claims (p. 18) that the record is barren of any motion by appellants to make the complaint more definite and certain, or for a bill of particulars, and that even though the complaint failed to allege fraud or evasion, "appellee could prove these allegations by any method it saw fit." No authorities are cited, however, to justify that statement.

Now, as a matter of fact, a motion to make the second amended complaint more definite and certain and for a bill of particulars was presented and denied, and appellee has a copy thereof. It was not made a part of the record because it is not material.

Appellee should know that no motion by appellants, could have elicited the fact that appellee intended to further change the cause of action by attempting to prove fraud.

Appellee (pp. 18 to 21) sets out a portion of the typewritten transcript, quoting statements made at trial, not by any witness, but by the attorneys for the O.P.A., but omits a pertinent remark by the Court (p. 54, typewritten trans.).

“THE COURT: That is the theory of the O.P.A. that the defendant should have known it. The O.P.A. must plead it, when they want the defendants to know it.”

Appellee states (p. 22) that “Granite Falls Planing Mill was organized by these defendants as a corporation,” but failed to state that it was organized long before either SSR 27 or MPR 539 was issued or became effective (R. 222, 230).

Appellee concludes (p. 23) that because the customers of Granite Falls Planing Mill ordered it to show M. A. Wyman Lumber Co. as shipper (R. 119) that M. A. Wyman and the other appellants are guilty of fraud and evasion, regardless of whether or not they knew of this arrangement.

Appellee finally states (pp. 23, 24) that the theory of plaintiff's action is the use made of Granite Falls Planing Mill as a “dummy” to violate MPR 539, “and nothing more.” But appellee fails to set out any allegation of the second amended complaint to sustain that theory, or any proof to support it. The second amended complaint (Count II) on which this case

was tried. is based *solely on RMPR 26* and contains no mention of MPR 539. Therefore, by appellee's own admission it is a variation of the allegations of the second amended complaint.

While appellee admits (p. 23) that an officer of a corporation cannot be held personally liable for the acts of the corporation, yet it asks this Court to hold appellants liable for planing services performed by the corporation, for which the stipulation and evidence admit the corporation invoiced and received payment, both of which also admit that the corporation never sold *any* lumber. Therefore, how or in what way could this corporation be used to violate RMPR 26.

Appellee in effect urges this court to *assume* fraud, trickery and evasion, in spite of the invoices and stipulation. Even if evidence of fraud had been admissible, it still must be proven by clear and convincing testimony. Certainly the testimony of Mr. Rothfield, the only witness concerning fraud, does not fulfill those requirements.

Appellee says (p. 24) that it has "no quarrel with the authorities cited by appellants." The fact that appellee has seen fit to criticize only one (p. 14) of the forty-three authorities cited by appellants, and the further fact that it has referred to no evidence questioning the accuracy of appellants' brief, is indeed a tribute not enjoyed by many appellants.

Appellee says (p. 25) that the defense of estoppel is not available against the United States, and cites three cases in support of that statement.

The question of estoppel in the cases of *U.S. v.*

City and County of San Francisco, 106 F.(2d) 569, and *Korman v. Fed. Housing Adms.*, 113 F.(2d) 743, cited by appellee, was not involved in either of these two cases.

In *U.S. v. Stewart*, 121 F.(2d) 705, cited by appellee, which was an action by the United States to quiet title to certain marsh land, title to which the defendant claimed by prescription, the Court merely held that title to land belonging to the United States, cannot be acquired by prescription or laches on the part of the United States.

The estoppel in this case is not one based on laches, or one involving the construction of a regulation, but is rather one based on honesty and fair dealing. In such cases it was held in *U.S. v. Denver R. G. Ry.* (C.C.A. 8, 1926) 16 F.(2d) 374, that the United States or a state may be estopped.

Appellee also states (p. 25) that the defense of estoppel has not been pleaded.

The record shows (R. 181, *et seq.*) that this question was injected into this case by *appellee* (over appellants' objections) (R. 104, 113, 120, 121, 122) when it called Mr. Wurnsted, the head of the lumber division of the O.P.A., to show what became of the application of Granite Falls Planing Mill. His testimony showing estoppel was admitted on cross-examination without any objection by appellee (R. 195 to 198, 205 to 207). Therefore, it was not necessary to specially plead estoppel.

Appellee says (p. 27) "Of course these appellants were all partners in the two companies." This is in-

correct. M. H. Wyman and Edward Doran were partners *only* in Wyman Mill Company. The pleadings, evidence and stipulation so show. Appellee (p. 28) quoted a portion of the testimony of Mr. Doran, a witness on behalf of *appellee* (R. 115).

The *very next questions* asked by the Court were:

“THE COURT: Will you state that again please.

THE WITNESS: Our orders came from the *customer* to the Granite Falls Planing Mill authorizing us *how* to remanufacture that lumber, *how* to surface that lumber, whether we should re-saw it or plane it, mark it, grade it and load it on cars.

THE COURT: That was from the buyer you got that request?

THE WITNESS: That is right.

THE COURT: What lumber would he have you plane and saw and mark and so forth?

THE WITNESS: Well, the order would come to our mill, and we would have it (lumber) in the rough. Then we would not put that through the planer until such time as we got orders from the customers, instructing us what to do with that lumber.

THE COURT: You are speaking of the Granite Falls Planing Mill?

THE WITNESS: That is right.” (R. 15)

Thus it is apparent that appellee’s isolated statement (p. 27) that “orders came for the Wyman Mill Co.” is not only meaningless, but misleading.

Appellee (p. 29) attempts to justify the entry of judgment against M. H. Wyman and Edward Doran,

by citing a portion of Sec. 236, Remington's Revised Statutes of the State of Washington, which deals with a situation where the defendants are "*jointly* indebted upon a *contract*." Even if appellants violated any regulation, they are not jointly indebted, but are severally indebted, and in no event is the action based upon a contract, nor does this judgment provide that it may be enforced only against the partnership property.

Paragraph 2 of Sec. 236, however, provides as follows:

"2. If the action is against defendants *severally* liable, he (plaintiff) may proceed against the defendants *served* in the same manner as if they were the only defendants."

In *Livingstone v. Lovegren*, 27 Wash. 102, cited by appellee, the plaintiff in that case waived the tort action, and brought suit on the contract.

In *Peha's University Food Shop v. Stimpson Corp.*, 177 Wash. 406, cited by appellee, the Court found that the garnishee defendant held property belonging to the two defendants *jointly* and that both defendants "were *jointly* indebted on contract to respondent." Even in that case, however, the judgment specifically provided that it could be satisfied only against the joint property of the two defendants, and the separate property of the defendant served.

The stipulation admits (R. 62) that this is a "penal action," and whether this case is decided under State or Federal law is immaterial, for both have held that:

"It is a settled rule that in order to sue a part-

nership, *each partner* must be personally served with process." (p. 36, appellants' brief)

The abatement of this suit as to M. H. Wyman and Edward Doran (R. 36) ended this action as to them in *every* capacity, and subsequent service on February 28, 1946 (R. 45) could not revive it.

We again repeat that there was no evidence even remotely connecting M. H. Wyman or Edward Doran with the violation of any regulation. Appellee's only answer to this, is (p. 30) "This, of course, is not the fact." But again it fails to produce any evidence to the contrary.

Appellee admits (p. 31) that "If counsel claimed surprise he had a right to a continuance," if he had asked for it. The Court clearly indicated (R. 107 to 111) that evidence of a change of the cause of action, and fraud would *not* be admissible under the issues in this case. Hence there was no reason then for appellants to insist upon a continuance.

Appellants' opening brief has carefully referred to the pages in the printed record, substantiating *every* statement made in their brief. The record speaks for itself. Many of appellee's statements, however, cannot be verified by the record, nor does appellee pretend to do so. It merely states its conclusions without any reference to any evidence to support them.

We confidently believe that the portions of the record referred to in appellants' opening brief will show:

1. That appellee changed the cause of action after the expiration of the one-year statute of limitations.

2. That appellee's figures of \$19,129.09 or \$19,-130.67, are erroneous.

3. That there is no evidence that appellants ever sold any surfaced lumber, or any other lumber except rough lumber, which the evidence and stipulation both admit are in accordance with RMPR 26.

4. That the only testimony concerning fraud or overcharges, is the conclusion of one witness, based solely on his imagination, and admittedly without *any* facts.

5. That there is no evidence that appellants used Granite Falls Planing Mill to violate RMPR 26.

6. That appellee has failed to connect M. A. Wyman with the sale of any surfaced lumber.

7. That the evidence amounts to an estoppel against appellee.

8. That there is no evidence of the violation of any regulation by M. H. Wyman or Edward Doran.

9. That this case should have been dismissed at the close of appellee's testimony for failure of proof.

10. That no judgment should have been awarded against appellants.

11. That the record shows surprise, which ordinary prudence by appellants could not have guarded against resulting in a failure of justice to appellants.

It is, therefore, respectfully submitted that the judgment should be reversed, or at least a new trial should be granted to appellants.

Respectfully submitted,

C. E. HUGHES,

Attorney for Appellants.



No. 11,702

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

JAMES MOORE SCOTT,

Appellant,

VS.

JAMES A. JOHNSTON, Warden, United
States Penitentiary, Alcatraz Island,
California,

Appellee.

BRIEF FOR APPELLEE.

FRANK J. HENNESSY,

United States Attorney,

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Post Office Building, San Francisco, California,

Attorneys for Appellee.

FILED

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PAUL P. DARRIN



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No. 11,702

IN THE

**United States Circuit Court of Appeals
For the Ninth Circuit**

JAMES MOORE SCOTT,

Appellant,

vs.

JAMES A. JOHNSTON, Warden, United
States Penitentiary, Alcatraz Island,
California,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

This is an appeal from an order of the United States District Court for the Northern District of California, hereinafter called "the Court below", discharging the writ of habeas corpus previously issued by it, and dismissing appellant's petition therefor. (Tr. pp. 24-33.) The Court below had jurisdiction of the habeas corpus proceedings under Title 28 U.S.C.A., Sections 451, 452 and 453. Jurisdiction to review the order of the Court below dismissing the petition is conferred upon this Honorable Court by Title 28 U.S.C.A., Sections 463 and 225.

STATEMENT OF FACTS.

This is an appeal from the order of the Court below denying appellant's application for relief and discharging the writ of habeas corpus. (Tr. 24-33.) The appellant, an inmate of the United States penitentiary at Alcatraz Island, California, filed a petition for writ of habeas corpus in which he alleged in substance that he was illegally restrained of his liberty by the appellee, the Warden of the said penitentiary, because he was denied his right of assistance of counsel before the trial Court and that he was sentenced by the trial Court without having entered a plea of guilty or without having been convicted of the offenses with which he was charged. (Tr. 1-12.) The Court below issued an order to show cause. (Tr. 13.) The appellee filed a return to order to show cause (Tr. 14, 15) and the appellant filed a traverse to return on order to show cause. (Tr. 16-18.) Thereafter a writ of habeas corpus was issued (Tr. 19, 20), to which writ appellee filed a return. (Tr. 21-23.) A hearing was granted on the writ of habeas corpus, at which hearing appellant was represented by counsel. (Tr. 46.) It was stipulated between counsel that the traverse to the return to the order to show cause would be deemed as a traverse to the return to the writ of habeas corpus. (Tr. 47.) During the hearing said appellant's testimony was taken, and other testimony, and by stipulation, affidavits were received in evidence on behalf of the appellant and the appellee. (Tr. 46-208.) The Court below, after hearing the cause and submission of the same, filed an order and memorandum opinion deny-

ing the application for release and discharging the writ of habeas corpus. (Tr. 24-33.) See also appendix to this brief. From this latter order appellant now appeals to this Honorable Court. (Tr. 34.)

CONTENTIONS OF APPELLANT.

The appellant contends in substance that

(1) he was sentenced by the trial Court without entering a plea of guilty or being convicted of the offenses with which he was charged;

(2) he was denied his right of assistance of counsel before the trial Court;

(3) the Court below erred in admitting into evidence in the habeas corpus proceedings, two affidavits, one by the trial Judge and one by the trial Judge's Secretary.

CONTENTIONS OF APPELLEE.

Appellee asserts that

(1) appellant freely and voluntarily entered a plea of guilty to the offenses with which he was charged before the trial Court;

(2) appellant was not denied his right of assistance of counsel before the trial Court but intelligently and competently waived the same;

(3) the affidavits of the trial Judge and the trial Judge's Secretary were properly received in evidence in the habeas corpus proceedings in the Court below.

ARGUMENT.

1. APPELLANT WAS NOT SENTENCED BY THE TRIAL COURT WITHOUT ENTERING A PLEA OF GUILTY OR BEING CONVICTED OF THE OFFENSES WITH WHICH HE WAS CHARGED.
2. APPELLANT WAS NOT DENIED HIS RIGHT OF ASSISTANCE OF COUNSEL BEFORE THE TRIAL COURT.

The Court below in its order and memorandum opinion has not only made findings of fact and conclusions of law which sustain appellee's contentions 1 and 2, hereinabove set forth, but has supported these findings by reference to the record and by citation of many legal authorities. Therefore any additional argument which appellee might herein advance would be in the nature of surplusage, particularly in view of the thorough and exhaustive study of the problems involved herein and a thorough search of authorities dealing with the same made by the Court below in arriving at the conclusion that the appellant was within the lawful custody of the appellee.

The appellee accordingly adopts *in toto* the order and memorandum opinion of the Court below, the reasoning therein, the authorities cited in support thereof and affixes the same as an appendix to this brief.

-
3. THE AFFIDAVITS OF THE TRIAL JUDGE AND THE TRIAL JUDGE'S SECRETARY WERE PROPERLY RECEIVED IN EVIDENCE IN THE HABEAS CORPUS PROCEEDINGS IN THE COURT BELOW.

Attention is called to the following proceedings found at pages 182 and 183 of the transcript:

“Counsel Appearing:

For the Petitioner:	George Curtis, Esq.
For Respondent:	Joseph Karesh, Esq., Assistant United States Attorney.

The Clerk. Scott vs. Johnston.

Mr. Karesh. Ready.

Mr. Curtis. Ready.

Mr. Karesh. Your Honor may recollect that at the last hearing of the case it was agreed that the petitioner would not be present; he had no additional testimony to offer and this being a civil proceeding he is not entitled to be here at all stages of the proceeding.

Your Honor, we have received from Arkansas two affidavits, one from the United States District Judge who presided at the arraignment, plea and sentence, and the second one is from the Secretary and Court Reporter for the Judge. It has been stipulated, am I correct, Mr. Curtis, that the objection as to hearsay is waived and we won't have to take depositions, the affidavits will be sufficient, of course subject to all other objections?

Mr. Curtis. Yes.

Mr. Karesh. I would like to read them into the record and you can make your objections as I read them.”

It should also be noted that pursuant to stipulation between counsel for the appellant and counsel for the appellee an affidavit of Wiley F. Smith, attorney-at-law, was offered and received in evidence in the habeas

corpus proceedings in the Court below on behalf of appellant. In this connection attention is called to page 190 of the transcript, wherein the following is found:

“Mr. Curtis. Before you proceed with the argument I have an affidavit here from Attorney Wiley F. Smith, who represented the defendant Hutson in this case.

Mr. Karesh. My objection as to its being hearsay may be waived and you can offer it and read it.

The Court. Read it into the record.”

The appellant, who is not represented by counsel on appeal has apparently overlooked the stipulations in this case. Affidavits are always permitted in evidence by stipulation, assuming, of course, that they are material to the issues involved. Furthermore, even without stipulation, affidavits are received in evidence if no hearsay objection is raised.

Burgess v. King (CCA-8), 130 F. (2d) 761.

In our case at bar, the appellant, through his counsel, waived the hearsay objection to the affidavits in question. He cannot now for the first time complain of this testimony, particularly in view of the fact that “Habeas Corpus is in its nature a civil rather than a criminal proceeding, even though invoked in behalf of one charged with or convicted of crime.” *Burgess v. King*, *supra*, at page 762. Should appellant later complain in his closing brief that he was not present in Court when the stipulations were entered into, appellee believes that it is sufficient for him to now say

the act of an attorney in a legal proceeding is the act of his client, and the presence of a party to a civil action is not required in Court during all stages of such proceeding.

CONCLUSION.

The record in this case amply supports the findings of the Court below, that appellant freely and voluntarily entered his plea of guilty to the charges set forth in the indictment, that he was not denied his right to counsel, but intelligently and competently waived the same, and that he was not denied due process of law before the trial Court. Furthermore, the Court below acted properly in receiving in evidence the affidavits offered by stipulation. The decision of the Court below therefore is correct and should be affirmed.

Dated, San Francisco, California,
November 7, 1947.

Respectfully submitted,

FRANK J. HENNESSY,

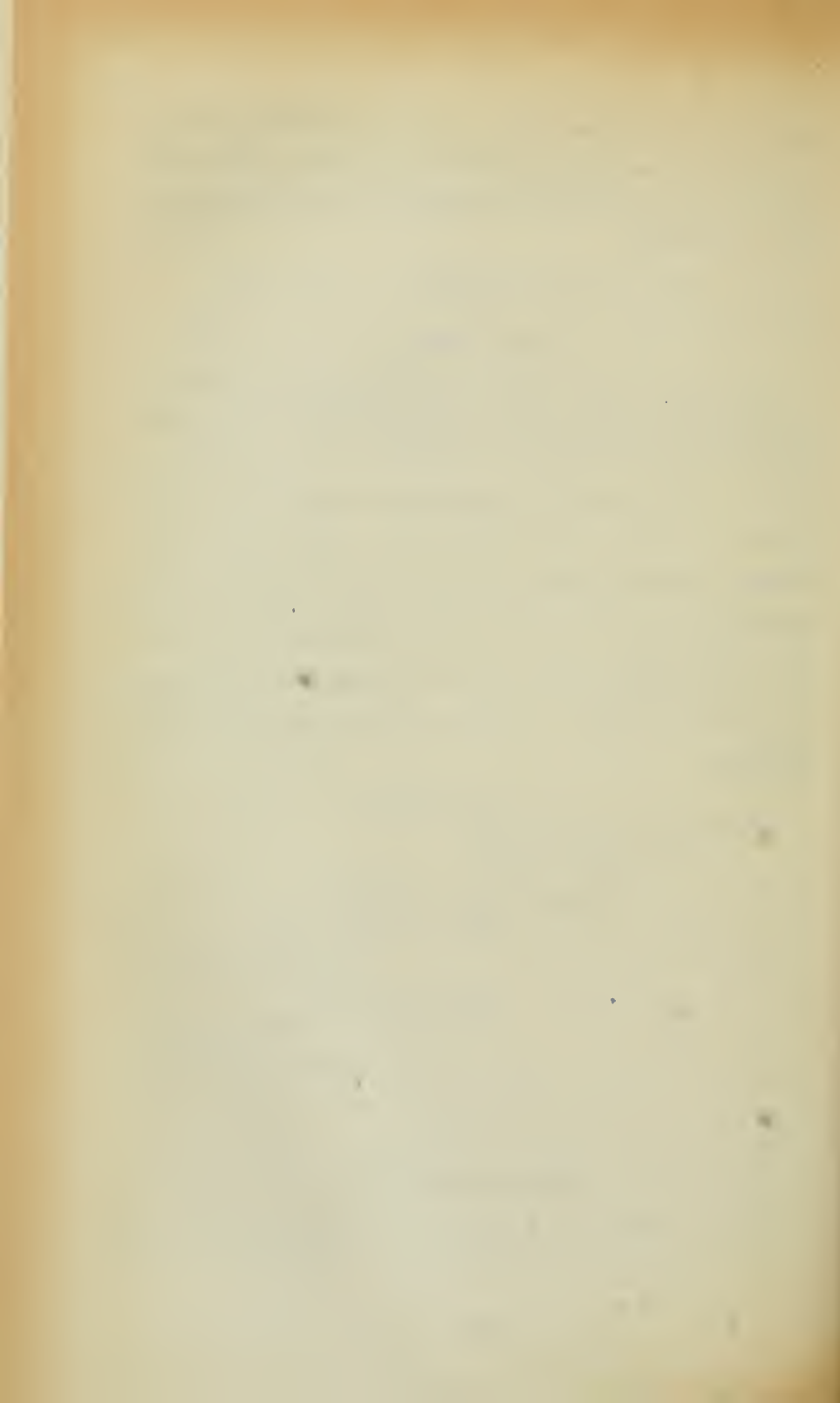
United States Attorney,

JOSEPH KARESH,

Assistant United States Attorney,

Attorneys for Appellee.

(Appendix Follows.)



Appendix.



Appendix

[Title of Court and Cause.]

The petitioner, James Moore Scott, confined in Alcatraz Penitentiary, has filed a petition for writ of habeas corpus herein and, after the lapse of approximately nine years, attack is now made upon the judgment and sentence imposed by the United States District Court, Eastern District of Arkansas, Northern Division, for the violation of Title 18 U.S.C.A., Sec. 320. The indictment, framed in two counts, charged Thedora Hutson and petitioner with the armed robbery of a post office, the assault of the Postmaster, and the theft of postal funds.

A rule to show cause issued based upon said petition and a return made thereto; traverse thereafter was filed by petitioner to the writ, an issue of fact having been created Hon. A. F. St. Sure issued the writ. Petitioner was produced before the Court, and counsel was appointed to represent him. After partial hearing of the matter by Judge St. Sure it was stipulated that this Court hear and finally determine the cause.

The several grounds urged are: (1) Petitioner was sentenced to a term of twenty-five years imprisonment for armed post office robbery without entry of a plea; (2) He was deprived of his Constitutional right of assistance of counsel, as contemplated by the Supreme Court of the United States in *Johnston v. Zerbst*, 304 U.S. 458.

The pattern of petitioner's criminal career is reflected in his testimony: his first conviction occurred in 1927 for stealing a calf; he entered a plea of guilty and served two years in McAlester, Oklahoma. Thereafter, in 1930, he was convicted of burglary, after entering a plea of guilty, and served a seven year sentence in an Oklahoma Penitentiary. He was represented by counsel at the time of trial. During his term in the penitentiary he escaped, but after a period of eight months he was apprehended and finished his term.

In 1934 he was convicted in Missouri for carrying concealed weapons. During the course of the trial, and while represented by counsel, he changed his plea to guilty. He served two years on this latter charge.

The next encounter with the law was his arrest at Newport, Arkansas, on the 4th day of July, 1937, which resulted in the judgment and sentence now under attack.

Petitioner's first contention that he was sentenced without the entry of a plea is not substantiated by the record, and the evidence which he offered is not worthy of belief. This Court in weighing the testimony, has the right to consider the petitioner's ripe experience in criminal matters, together with his credibility as a witness. *Alexander v. Johnston*, 9 Cir., 137 F. (2d) 712, 713; *O'Keith v. Johnston*, 9 Cir., 129 F. (2d) 889, 891.

It is to be noted that the judgment, sentence and warrant of commitment (Respondent's Exhibit B) states in pertinent part:

“* * * and comes the defendant to the bar of the court in the custody of the Marshal and being advised concerning the nature of the indictment against him herein and being demanded how he will acquit himself thereof saith that he cannot deny but that he is guilty as charged and puts himself upon the mercy of the court.”

Respondent relies on the written record that the petitioner entered a plea of guilty, as against the unsupported allegation of the petitioner, a convicted felon, that no plea whatsoever was entered. In *Bennett v. Hunter*, 10 Cir., 155 F. (2d) 223, 225, it was said:

“In the absence of a showing of fraud, a judgment imports verity and its recitals may not be challenged in a collateral proceeding by parol testimony. *Thomas v. Hunter*, 10 Cir., 153 F. (2d) 834.”

To the same effect, *Cochran v. Kansas*, 316 U.S. 255, 256; *Riddle v. Dyche*, 43 S. Ct. 555, 556; 262 U.S. 333.

Apart from the foregoing recitals in the judgment, it appears from the testimony of Postal Inspector White, called by respondent, that petitioner upon his arrest, although declining to make a written statement, never denied active participation in the robbery. In effect, he admitted his guilt, and participation with Hutson, a youth of the age of twenty-one with no prior criminal record, who implicated petitioner as the prime actor in the perpetration of the felony, as it appears in a confession obtained by White. Although White could not recall all of the details surrounding

the court proceedings, having participated in many cases during the intervening years, it is manifest that his recollection was sufficiently clear with respect to the entry of the plea of guilty by petitioner. Scott's testimony that both he and Hutson were sentenced by the trial court without entering a plea¹ is patently incredible, and in direct conflict with the testimony of Attorney Wiley Smith.²

The written record alluded to must, therefore, prevail as against the unsupported testimony of petitioner seeking to attack its verity, and accordingly this Court finds that Scott did, on the 13th day of December, 1937, enter a plea of guilty.³

The second ground urged by petitioner that he was deprived of assistance of counsel is equally without merit. The respondent offered, and there were received in evidence, affidavits sworn to by the Hon.

¹Transcript, pp. 12, 26, 27, 28.

P. 26—Q. When you stood before the court on these proceedings you knew, you had been informed what you had been charged with? A. Yes, sir. Q. You knew why you were there? A. Yes, sir. Q. Did the court or the clerk ask you how you wanted to plead? A. No, sir. Q. He just sentenced you? A. That is correct.

P. 27—Q. You mean a lawyer was in the court with his client, Mr. Hutson, and he asked for probation for his client without ever having his client enter a plea? A. That is correct. Q. And that was the first time Hutson had been before the judge, as you had been before the judge? A. That was the first time I had ever been before the judge. If I had been before the judge, I didn't know anything about it. Q. Nobody asked you how you wanted to plead? A. That is correct.

²Transcript, p. 46. It should be noted that Wiley Smith, counsel for co-defendant Hutson, who also pled guilty in the postal robbery case, had previously served as an attorney for Scott during one of petitioner's earlier criminal trials.

³Respondent's Exhibits A and B, representing the docket entries and judgment and commitment.

Thomas C. Trimble, Jr., who presided at the time the petitioner appeared in court for trial, as well as an affidavit of Charles S. Harley, secretary and court reporter for the Judge. Both Judge Trimble and the court reporter, although admitting no personal recollection of the particular arraignment, plea and sentence of the petitioner Scott, alleged that it was the invariable custom of the Court to ask each defendant at the outset of a case if he had a lawyer. If he had not, the Court then asked him if he desired to have the Court appoint a lawyer for him. Furthermore, and as an additional safeguard for a defendant, the Court invariably appointed a lawyer to advise defendant, whether he requested such appointment or not, in all cases in which a defendant appeared doubtful as to his rights or his understanding of court procedure. On arraignment day it was, and is the custom of the Court to have lawyers available to assist in defending the impecunious and poorly educated defendant or to explain Constitutional rights to him. Thus it would appear from the assertions made in these affidavits that petitioner was given the opportunity of having counsel represent him.

The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case upon the particular facts and circumstances surrounding the case, including the background, experience and conduct of the accused, and on this hearing petitioner has the burden of sustaining his allegations by a preponderance of the evidence.

At the time of the instant judgment and sentence it appears that no provision was made for official Court reporters, and that a formal transcript of the proceedings is not available. Under the circumstances the customary procedure invoked by the trial judge, and confirmed by the Court reporter, must be given due consideration in weighing the evidence in the light of all of the surrounding circumstances in determining whether or not petitioner has discharged the burden of proof that he did not competently and intelligently waive his Constitutional right of assistance of counsel.⁴

In the well considered case of *Dorsey v. Gill* (CCA D.C.) 148 F. (2d) 857, 874, the Court used this appropriate language:

“The dangerous possibilities of a too-liberal use of the writ for review purposes are emphasized by the fact that—unlike most of the state Courts—no provision is made for official Court reporters in federal trial Courts and few transcripts are available. If the presumption of regularity of proceedings were permitted to be lightly upset by irresponsible allegations, the judges to whom petitions for writs of habeas corpus are presented, would be forced to look back of and beyond records, into unreported proceedings, conducted by other judges, with witnesses, lawyers and other

⁴*Harpin v. Johnston*, 9 Cir., 109 F. (2d) 434, 435;
Franzeen v. Johnston, 9 Cir., 111 F. (2d) 817, 819;
Lewis v. Johnston, 9 Cir., 112 F. (2d) 451;
Cooke v. Swope, 9 Cir., 28 F. Supp. 492, 493; affirmed 9 Cir.,
 109 F. (2d) 955;
De Jordan v. Hunter, 10 Cir., 145 F. (2d) 287, 288;
Towne v. Hudspeth, 10 Cir., 108 F. (2d) 676, 677;
Moore v. Hudspeth, 10 Cir., 110 F. (2d) 386, 388.

Court officers long since dead or scattered. The problem would be intensified, also, by the fact that a large percentage of commitments are based upon pleas of guilty. A premium would be placed upon deception if an accused person could plead guilty; wait until the case had become 'cold' and then, by challenging jurisdiction or alleging deprivation of constitutional rights, secure a reopening and new trial of his case. If greater safeguards are needed in original proceedings, they should be provided. But it will not solve any problem, which may exist there, to permit large-scale use of this extraordinary writ for review purposes. Instead, it would cause confusion worse confounded. It would be fantastic, so to interpret the Supreme Court's decisions as to permit and invite such a wholesale retrial of thousands of cases which have been regularly disposed of during the normal course of trial Court proceedings. Obviously the Supreme Court intended no such result."

It is recognized that under appropriate circumstances the Constitution requires that counsel be tendered; it does not require that under all circumstances counsel be forced upon a defendant. *Carter v. People of Illinois*, Supreme Court of the United States, decided December 9, 1946,U.S....., No. 36....., October Term, 1946; 91 U.S. L. Ed. Advance Opinion, p. 157.

It appears, therefore, from the evidence, and the Court finds, based upon the affidavits of the trial judge and the Court reporter, that an offer of counsel was made to petitioner when he appeared in the proceedings, and that such offer was not accepted.

The question follows whether the petitioner made an intelligent waiver of his right to be so represented by counsel when he entered his plea of guilty and held himself ready for sentence. *Walker v. Johnston*, 312 U.S. 275. As it appears from the record, Scott was no tyro in the field of crime, and it was not his first experience before the Courts in Arkansas and Missouri. He was not unfamiliar with Court procedure, and not unacquainted with his fundamental Constitutional rights. This case, then, is not one wherein an intelligent waiver of counsel is a tenuous inference from the mere fact of a plea of guilty. *Carter v. Illinois*, *supra*.

A fair reading and analysis of the record in the light of the affidavits of the trial judge, Court reporter and testimony of Inspector White, reflect that petitioner exercised an intelligent waiver of his right to counsel at the time he entered his plea.

In *O'Keith v. Johnston*, *supra*, the Court said in part (p. 891):

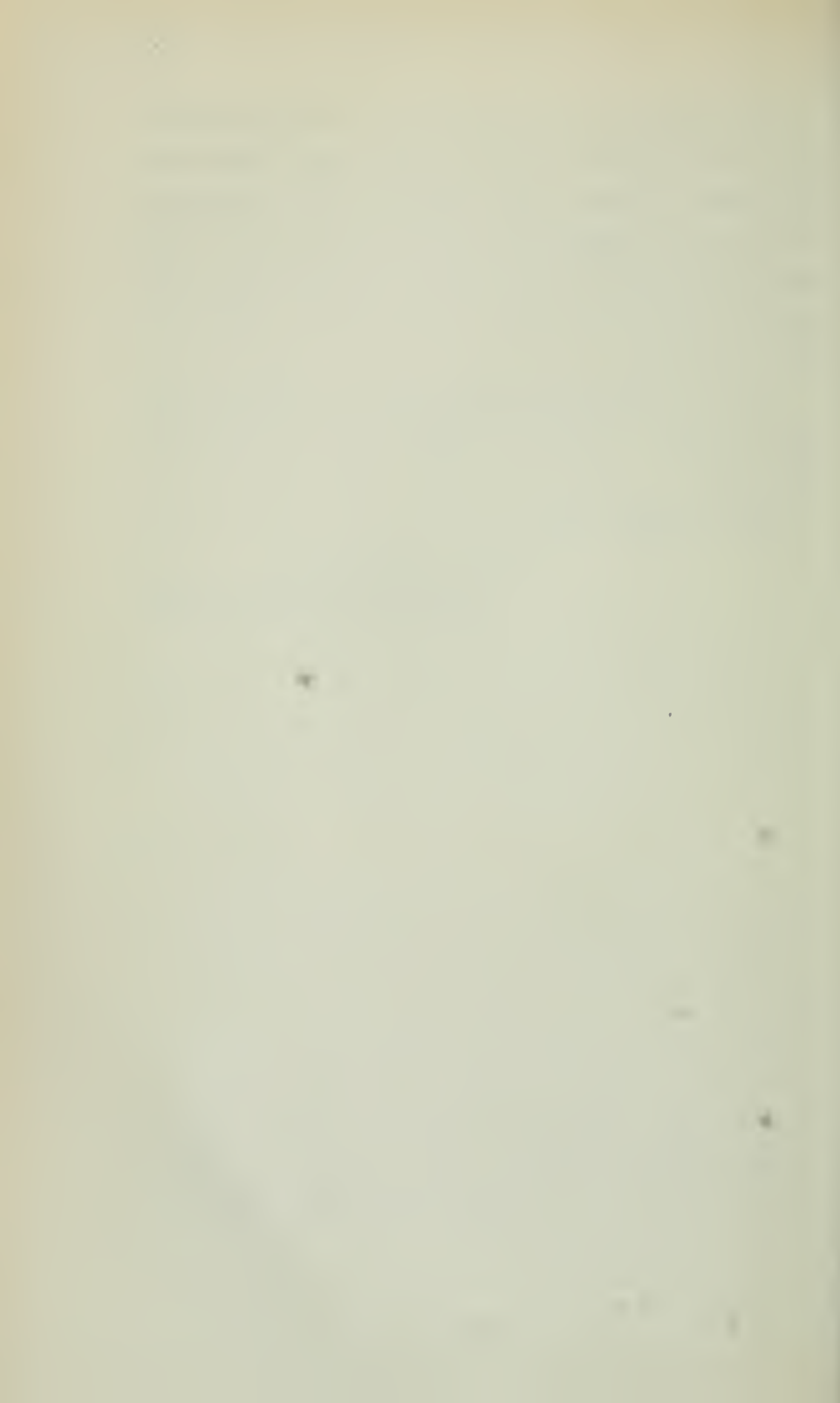
“Appellant has been convicted of other felonies and his credibility is thus impeached and his testimony should be rejected unless, notwithstanding the base character of the witness, the Court finds him entitled to belief. The acceptance of contrary evidence from credible witnesses appearing before that Court is binding upon us. Federal Rules of Civil Procedure, rules 52(a), 81(a) (2), 28 U.S.C.A. following section 723c; *Kelly v. Johnston*, 9 Cir., 128 F. 2d 793, decided by this Court June 8, 1942.”

THEREFORE, THIS COURT FINDS: 1. That petitioner did, on the 13th day of December, 1937, freely and voluntarily, enter a plea of guilty to the charges set forth in the indictment; 2. That petitioner was not denied his right to counsel, but intelligently and competently waived the same, and was not denied due process of law.

The writ of habeas corpus heretofore issued will be, and the same is hereby discharged, and the petition dismissed.

Dated, April 1, 1947.

GEORGE B. HARRIS,
United States District Judge.



No. 11703

United States
Circuit Court of Appeals

For the Ninth Circuit.

see vol. 2490

GEORGE B. CAREY,

Appellant,

vs.

HILO FINANCE & THRIFT CO., LTD.,
a corporation,

Appellee.

Transcript of Record

UPON APPEAL FROM THE SUPREME COURT OF
THE TERRITORY OF HAWAII

FILED

NOV 4 - 1947

PAUL P. O'BRIEN,

CLERK



No. 11703

United States
Circuit Court of Appeals
For the Ninth Circuit.

GEORGE B. CAREY,

Appellant,

vs.

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Transcript of Record

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THE TERRITORY OF HAWAII



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Attorneys for Respondent-Appellee.

BRAHAN HOUSTON, ESQ.,

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Honolulu, T. H.

Attorney for Petitioner-Appellant.

In the Circuit Court of the Third Judicial Circuit,
Territory of Hawaii

L. No. 2316

Action in Assumpsit with Garnishment and
Attachment in Aid

HILO FINANCE AND THRIFT COMPANY,
LIMITED,

Plaintiff,

vs.

GEORGE B. CAREY,

Defendant,

BANK OF HAWAII and BISHOP NATION-
AL BANK OF HAWAII AT HONOLULU,
Garnishees.

PLAINTIFF'S AMENDED DECLARATION

To the Honorable Ray J. O'Brien, Judge of the
Circuit Court of the Third Judicial Circuit:

Comes now Hilo Finance and Thrift Company, Limited, a Hawaiian corporation, named herein as Plaintiff, and complaining against George B. Carey, a resident of Honolulu, City and County of Honolulu, Territory of Hawaii, named herein as Defendant, and for cause of complaint says:

First Cause of Action

Count 1.

That heretofore, to wit, on or about the 31st day

of August, A. D. 1937, the said defendant, for and in consideration of the sum of \$2,330.00 to be advanced by the plaintiff at its office in Hilo, County and Island of Hawaii, promised and undertook to repay to the plaintiff at its said office in Hilo, the said sum of \$2,330.00 in equal monthly installments of \$155.32 each until the whole amount of said sum should be fully paid, except that the last installment was to include any fractional portion of an installment remaining unpaid; that it was understood and agreed by the plaintiff and defendant that said monthly installments would be due and payable on the same day in each month that the advance was made, following the advance by the plaintiff; that defendant, in consideration of said advance made, executed and delivered to the plaintiff his promissory note dated August 31st, 1937, a copy of which is hereto attached, marked Exhibit "A" and made a part hereof; that said advance was made by the plaintiff on September 1, 1937; that notwithstanding his several promises and undertakings contained in said note, as modified by the oral contract of plaintiff and defendant, said defendant has not paid any part of said advance, excepting the sum of \$2,174.48.

That in accordance with the provisions of said note, as modified by the oral contract of plaintiff and defendant, the principal sum of \$155.52 became due and payable on the 1st day of December, 1938, and plaintiff is entitled to the sum of \$155.52, together with interest thereon at the legal rate from

and after December 1, 1938, which said sum the defendant has neglected and refused to pay and still neglects and refuses to pay;

That said defendant, by his said note, further agreed to pay, as and for an attorney's fee if the said note is placed in the hands of an attorney, 10% of the unpaid amount of said note; that said note has been placed in the hands of an attorney for collection.

Count 2.

That heretofore, to wit, on or about the 1st day of December, 1938, the defendant was and became indebted to the plaintiff in the sum of \$155.52 for money theretofore had and received by the defendant from the plaintiff, and being so indebted, in consideration thereof, the defendant undertook and faithfully promised to pay said plaintiff the last mentioned sum of money when he should be thereto requested; that although repeated demand has been made on defendant for said sum said defendant has failed, neglected and refused and still fails, neglects and refuses to pay the said sum or any part thereof to the damage of the plaintiff in the said sum of \$155.52.

Second Cause of Action

Count 1.

That heretofore, to wit, on or about the 28th day of September, A. D. 1937, the said defendant for and in consideration of the sum of \$2,330.00 to be advanced by the plaintiff at its office in said Hilo, County and Island of Hawaii, agreed, promised and

undertook to repay to the plaintiff, at its office in said Hilo, the said sum of \$2,330.00, in equal monthly installments of \$155.32 each until the whole amount of said sum should be fully paid, except that the last installment was to include any fractional portion of an installment remaining unpaid; that it was understood and agreed by the plaintiff and defendant that said monthly installments would be due and payable on the same day in each month that the advance was made, following the advance by the plaintiff; that defendant, in consideration of said advance made, executed and delivered to the plaintiff his promissory note dated Sept. 28, 1937, a copy of which is hereto attached, marked Exhibit "B" and made a part hereof; that said advance was made by the plaintiff on October 1, 1937; that notwithstanding his several promises and undertakings contained in said note, as modified by the oral contract of plaintiff and defendant, said defendant has not paid any part of said advance, excepting the sum of \$2,019.16;

That the defendant has defaulted in the payment of his said undertaking, contained in said note, as modified by said oral contract, and by reason of said default there became due and payable to the plaintiff the unpaid balance of said advance, to wit, \$310.84, together with interest at the legal rate on \$155.32 thereof from December 1, 1938, and on \$155.52 thereof from January 1, 1939, which said sum the defendant has neglected and refused to pay and still neglects and refuses to pay;

That said defendant, by his said note, further agreed to pay as and for an attorney's fee if the said note is placed in the hands of an attorney, 10% of the unpaid amount of said note; that said note has been placed in the hands of an attorney for collection.

Count 2.

That heretofore, to wit, on or about the 1st day of December, 1938, the defendant was and became indebted to the plaintiff in the sum of \$310.84 for money theretofore had and received by the defendant from the plaintiff, and being so indebted, in consideration thereof, the defendant undertook and faithfully promised to pay said plaintiff the last mentioned sum of money when he should be thereto requested; that although repeated demand has been made on defendant for said sum said defendant has failed, neglected and refused and still fails, neglects and refuses to pay the said sum or any part thereof to the damage of the plaintiff in the said sum of \$310.84.

Third Cause of Action

Count 1.

That heretofore, to wit, on or about the 29th day of October, A. D. 1937, the said defendant, for and in consideration of the sum of \$2,330.00 to be advanced by the plaintiff at its office in said Hilo, County and Island of Hawaii, agreed, promised and undertook to repay to the plaintiff, at its office in said Hilo, the said sum of \$2,330.00 in equal monthly installments of \$155.32 each until the whole amount

of said sum should be fully paid, except that the last installment was to include any fractional portion of an installment remaining unpaid; that it was understood and agreed by the plaintiff and defendant that said monthly installments would be due and payable on the same day in each month that the advance was made, following the advance by the plaintiff; that defendant, in consideration of said advance made, executed and delivered to the plaintiff his promissory note dated the 29th day of October, A. D. 1937, a copy of which is hereto attached, marked Exhibit "C" and made a part hereof; that said advance was made by the plaintiff on Nov. 2, 1937; that notwithstanding his several promises and undertakings contained in said note, as modified by the oral contract of plaintiff and defendant, said defendant has not paid any part of said advance, excepting the sum of \$1,863.84;

That the defendant has defaulted in the payment of his said undertaking, contained in said note, as modified by said oral contract, and by reason of said default there became due and payable to the plaintiff the unpaid balance of said advance, to wit, \$466.16, together with interest at the legal rate on \$155.32 thereof from December 2, 1938, on \$155.32 thereof from January 2, 1939, and on \$155.52 thereof from February 2, 1939, which said sum the defendant has neglected and refused to pay and still neglects and refuses to pay;

That said defendant, by his said note, further agreed to pay as and for an attorney's fee if the

said note is placed in the hands of an attorney, 10% of the unpaid amount of said note; that said note has been placed in the hands of an attorney for collection.

Count 2.

That heretofore, to wit, on or about the 2nd day of December, 1938, the defendant was and became indebted to the plaintiff in the sum of \$466.16 for money theretofore had and received by the defendant from the plaintiff, and being so indebted, in consideration thereof, the defendant undertook and faithfully promised to pay said plaintiff the last mentioned sum of money when he should be thereto requested; that although repeated demand has been made on defendant for said sum said defendant has failed, neglected and refused and still fails, neglects and refuses to pay the said sum or any part thereof to the damage of the plaintiff in the said sum of \$466.16.

Fourth Cause of Action

Count 1.

That heretofore, to wit, on or about the 17th day of November, A. D. 1937, the said defendant, for and in consideration of the sum of \$2,330.00 to be advanced by the plaintiff at its office in Hilo, County and Island of Hawaii, agreed, promised and undertook to repay to the plaintiff, at its office in said Hilo, the said sum of \$2,330.00 in equal monthly installments of \$155.32 each until the whole amount of said sum should be fully paid, except that the

last installment was to include any fractional portion of an installment remaining unpaid; that it was understood and agreed by the plaintiff and defendant that said monthly installments would be due and payable on the same day in each month that the advance was made, following the advance by the plaintiff; that defendant, in consideration of said advance made, executed and delivered to the plaintiff his promissory note dated the 17th day of Nov., 1937, a copy of which is hereto attached, marked Exhibit "D" and made a part hereof; that said advance was made by the plaintiff on Nov. 18, 1937; that notwithstanding his several promises and undertakings contained in said note, as modified by the oral contract of plaintiff and defendant, said defendant has not paid any part of said advance, excepting the sum of \$1,708.52;

That the defendant has defaulted in the payment of his undertaking, contained in said note, as modified by said oral contract, and by reason of said default there became due and payable to the plaintiff the unpaid balance of said advance, to wit, \$621.48, together with interest at the legal rate on \$155.32 thereof from Nov. 18, 1938, on \$155.32 thereof from Dec. 18, 1938, on \$155.32 thereof from Jan. 18, 1940, and on \$155.52 thereof from February 19, 1940, which said sum the defendant has neglected and refused to pay and still neglects and refuses to pay;

That the said defendant, by his said note, further agreed to pay as and for an attorney's fee if the said note is placed in the hands of an attorney,

10% of the unpaid amount of said note; that said note has been placed in the hands of an attorney for collection.

Count 2.

That heretofore, to wit, on or about the 18th day of Nov., 1938, the defendant was and became indebted to the plaintiff in the sum of \$621.48 for money theretofore had and received by the defendant from the plaintiff, and being so indebted, in consideration thereof, the defendant undertook and faithfully promised to pay said plaintiff the last mentioned sum of money when he should be thereto requested; that although repeated demand has been made on defendant for said sum said defendant has failed, neglected and refused and still fails, neglects and refuses to pay the said sum or any part thereof to the damage of the plaintiff in the said sum of \$621.48.

Fifth Cause of Action

Count 1.

That heretofore, to wit, on or about the 30th day of November, A. D. 1937, the said defendant, for and in consideration of the sum of \$2,330.00 to be advanced by the plaintiff at its office in Hilo, County and Island of Hawaii, agreed, promised and undertook to repay to the plaintiff, at its office in said Hilo, the said sum of \$2,330.00 in equal monthly installments of \$155.32 each until the whole amount of said sum should be fully paid, except that the last installment was to include any fractional portion of an installment remaining unpaid; that it

was understood and agreed by the plaintiff and defendant that said monthly installments would be due and payable on the same day in each month that the advance was made, following the advance by the plaintiff; that defendant, in consideration of said advance made, executed and delivered to the plaintiff his promissory note dated Nov. 30th, 1937, a copy of which is hereto attached, marked Exhibit "E" and made a part hereof; that said advance was made by the plaintiff on Dec. 2nd, 1937; that notwithstanding his several promises and undertakings contained in said note, as modified by the oral contract of plaintiff and defendant, said defendant has not paid any part of said advance, excepting the sum of \$1,708.52;

That the defendant has defaulted in the payment of his said undertaking, contained in said note, as modified by said oral contract, and by reason of said default there became due and payable to the plaintiff the unpaid balance of said advance, to wit, \$621.48, together with interest at the legal rate on \$155.32 thereof from Dec. 2nd, 1938, on \$155.32 thereof from Jan. 2, 1939, on \$155.32 thereof from Feb. 2nd, 1939 and on \$155.52 thereof from March 2nd, 1939, which said sum the defendant has neglected and refused to pay and still neglects and refuses to pay;

That said defendant, by his said note, further agreed to pay as and for an attorney's fee if the said note is placed in the hands of an attorney, 10% of the unpaid amount of said note; that said has been placed in the hands of an attorney for collection.

Count 2.

That heretofore, to wit, on or about the 2nd day of Dec., 1938, the said defendant was and became indebted to the plaintiff in the sum of \$621.48 for money theretofore had and received by the defendant from the plaintiff, and being so indebted, in consideration thereof, the defendant undertook and faithfully promised to pay said plaintiff the last mentioned sum of money when he should be thereto requested; that although repeated demand has been made on defendant for said sum said defendant has failed, neglected and refused and still fails, neglects and refuses to pay the said sum or any part thereof to the damage of the plaintiff in the said sum of \$621.48.

Sixth Cause of Action

Count 1.

That heretofore, to wit, on or about the 31st day of December, A. D. 1937, the said defendant, for and in consideration of the sum of \$2,330.00 to be advanced by the plaintiff at its office in Hilo, County and Island of Hawaii, agreed, promised and undertook to repay to the plaintiff, at its office in said Hilo, the said sum of \$2,330.00 in equal monthly installments of \$155.32 each until the whole amount of said sum should be fully paid, except that the last installment was to include any fractional portion of an installment remaining unpaid; that it was understood and agreed by the plaintiff and defendant that

said monthly installments would be due and payable on the same day in each month that the advance was made, following the advance by the plaintiff; that defendant, in consideration of said advance made, executed and delivered to the plaintiff his promissory note dated December 31st, 1937, a copy of which is hereto attached, marked Exhibit "F" and made a part hereof; that said advance was made by the plaintiff on January 4th, 1938; that notwithstanding his several promises and undertakings contained in said note, modified by the oral contract of plaintiff and defendant, said defendant has not paid any part of said advance, excepting the sum of \$1,553.20;

That the defendant has defaulted in the payment of his said undertaking, contained in said note, as modified by said oral contract, and by reason of said default there became due and payable to the plaintiff the unpaid balance of said advance, towit, \$776.80, together with interest at the legal rate on \$155.32 thereof, from Dec. 4, 1938, on \$155.32 thereof from Jan. 4, 1939, on \$155.32 thereof from Feb. 4, 1939, on \$155.32 thereof from March 4, 1939, and on \$155.52 from April 4, 1939, which said sum the defendant has neglected and refused to pay and still neglects and refuses to pay;

That said defendant, by his said note, further agreed to pay as and for an attorney's fee if the said note is placed in the hands of an attorney, 10% of the unpaid amount of said note; that said note has been placed in the hands of an attorney for collection.

Count 2.

That heretofore, towit, on the 4th day of Dec., 1938, the said defendant was and became indebted to the plaintiff herein in the sum of \$776.80 for money theretofore had and received by the defendant from the plaintiff, and being so indebted, in consideration thereof, the defendant undertook and faithfully promised to pay said plaintiff the last mentioned sum of money when he should be thereto requested; that although repeated demand has been made on defendant for said sum defendant has failed, neglected and refused and still fails, neglects and refuses to pay the said sum or any part thereof to the damage of the plaintiff in the said sum of \$776.80.

Seventh Cause of Action

Count 1.

That heretofore, towit, on or about the 31st day of January, A. D. 1938, the said defendant, for and in consideration of the sum of \$2,330.00 to be advanced by the plaintiff at its office in Hilo, County and Island of Hawaii, agreed, promised and undertook to repay to the plaintiff, at its office in said Hilo, the said sum of \$2,330.00 in equal monthly installments of \$155.32 each until the whole amount of said sum should be fully paid, except that the last installment was to include any fractional portion of an installment remaining unpaid; that it was understood and agreed by the plaintiff and defendant that said monthly installments would be due and payable on the same day in each month that the ad-

vance was made, following the advance by the plaintiff; that defendant, in consideration of said advance made, executed and delivered to the plaintiff his promissory note dated January 31, 1938, a copy of which is hereto attached, made a part hereof and marked Exhibit "G"; that said advance was made by the plaintiff on February 2, 1938; that notwithstanding his several promises and undertakings contained in said note, modified by the oral contract of plaintiff and defendant, said defendant has not paid any part of said advance, excepting the sum of \$1,397.88;

That the defendant has defaulted in the payment of his said undertaking, contained in said note, as modified by said oral contract, and by reason of said default there became due and payable to the plaintiff the unpaid balance of said advance, towit, \$932.12, together with interest at the legal rate on \$155.32 thereof from Dec. 2nd, 1938, on \$155.32 thereof from Jan. 2nd, 1939, on \$155.32 thereof from Feb. 2nd, 1939, on \$155.32 thereof from March 2nd, 1939, on \$155.32 thereof from April 2nd, 1939, and on \$155.52 thereof from May 2nd, 1939, which said sum the defendant has neglected and refused to pay and still neglects and refuses to pay;

That said defendant, by his said note, further agreed to pay as and for an attorney's fee if the said note is placed in the hands of an attorney, 10% of the unpaid amount of said note; that said note has been placed in the hands of an attorney for collection.

Count 2.

That heretofore, towit, on the 2nd day of Dec., 1938, the said defendant was and became indebted to the plaintiff in the sum of \$932.12 for money theretofore had and received by the defendant from the plaintiff, and being so indebted, in consideration thereof, the defendant undertook and faithfully promised to pay said plaintiff the last mentioned sum of money when he should be thereto requested; that although repeated demand has been made on defendant for said sum said defendant has failed, neglected and refused and still fails, neglects and refuses to pay the said sum or any part thereof to the damage of the plaintiff in the said sum of \$932.12.

Eighth Cause of Action

Count 1.

That heretofore, towit, on or about the 28th day of February, 1938, the said defendant, for and in consideration of the sum of \$2,330.00 to be advanced by the plaintiff at its office in Hilo, County and Island of Hawaii, agreed, promised and undertook to repay to the plaintiff, at its office in said Hilo, the said sum of \$2,330.00 in equal monthly installments of \$155.32 each until the whole amount of said sum should be fully paid, except that the last installment was to include any fractional portion of an installment remaining unpaid; that it was understood and agreed by the plaintiff and defendant that said monthly installments would be due and payable on the same day in each month that the advance was

made, following the advance by the plaintiff; that defendant, in consideration of said advance made, executed and delivered to the plaintiff his promissory note dated February 28, 1938, a copy of which is hereto attached, made a part hereof and marked Exhibit "H"; that said advance was made by the plaintiff on March 8, 1938; that notwithstanding his several promises and undertakings contained in said note, modified by the oral contract of plaintiff and defendant, said defendant has not paid any part of said advance, excepting the sum of \$1,242.56;

That the defendant has defaulted in the payment of his said undertaking, contained in said note, as modified by said oral contract, and by reason of said default there became due and payable to the plaintiff the unpaid balance of said advance, towit, \$1,087.44, together with interest at the legal rate on \$155.32 thereof from December 8, 1938, on \$155.32 thereof from January 8, 1939, on \$155.32 thereof from February 8, 1939, on \$155.32 thereof from March 8, 1939, on \$155.32 thereof from April 8, 1939, on \$155.32 thereof from May 8, 1939, and on \$155.52 thereof from June 8, 1939, which said sum the defendant has neglected and refused to pay and still neglects and refuses to pay;

That said defendant, by his said note, further agreed to pay as and for an attorney's fee if the said note is placed in the hands of an attorney, 10% of the unpaid amount of said note; that said note has been placed in the hands of an attorney for collection.

Count 2.

That heretofore, towit, on the 8th day of December, 1938, the said defendant was and became indebted to the plaintiff in the sum of \$1,087.44 for money theretofore had and received by the defendant from the plaintiff, and being so indebted, in consideration thereof, the defendant undertook and faithfully promised to pay said plaintiff the last mentioned sum of money when he should be thereto requested; that although repeated demand has been made on defendant for said sum said defendant has failed, neglected and refused and still fails, neglects and refuses to pay the said sum or any part thereof to the damage of the plaintiff in the said sum of \$1,087.44.

All to the damage of the plaintiff in the sum of \$4,971.84

That Bank of Hawaii and Bishop National Bank of Hawaii at Honolulu are debtors of the defendant.

Wherefore plaintiff brings this action and prays that said defendant be summoned to appear and answer this declaration according to law; that it may have judgment against said defendant on Causes of Action I to VIII inclusive in the principal sum of \$4,971.84, together with interest on the several amounts from the dates as hereinabove set forth, and an attorney's fee equal to 10% of the amount of such principal and interest, together with its costs; and that certified copies hereof be left with Bank of Hawaii and Bishop National Bank of Hawaii at

Honolulu, Garnishees, and that they be instructed to withhold all moneys due to the defendant, and that a writ of attachment shall issue out of this Court and under the seal thereof against said defendant and be levied against such property as he may have subject to execution, and that the defendant answer such judgment as the plaintiff may have and recover herein.

HILO FINANCE AND THRIFT
COMPANY, LIMITED,

By CARLSMITH & CARLSMITH,
Its Attorneys.

Third Judicial Circuit,
County of Hawaii,
Territory of Hawaii—ss.

W. H. Hill, being first duly sworn, says upon his oath that he is the manager and Treasurer of Hilo Finance and Thrift Co., Ltd., plaintiff above named, and that he makes this verification on behalf of the plaintiff; that he has read the foregoing declaration, knows the contents thereof and that the same is true.

/s/ W. H. HILL.

Subscribed and sworn to before me this 22nd day of June, 1943.

[Seal] /s/ FLORENCE SOUZA,
Notary Public, Third Judicial Circuit, Territory of
Hawaii.

My Commission expires June 1, 1947.

EXHIBIT "A"

Collateral Note. No. 796. \$2,330.00

Aug. 31, 1937

For value received, I, we, or either of us, jointly and severally promise to pay to the order of Hilo Finance and Thrift Company, Ltd., of Hilo, Hawaii, at their office the sum of Twenty-three Hundred Thirty and No/100 Dollars in 15 equal installments of \$155.32 each on the 30th of each month following the date of this note, with interest from maturity at the rate of% per annum until paid, with ten per cent additional on amount unpaid, if placed in the hands of an attorney for collection, having deposited with and pledged to said Finance Company, as collateral security for the payment of this note, and all other liabilities of the undersigned to the legal holder hereof, whether direct, contingent, heretofore or hereafter contracted, the following property, to-wit:

Secured by collateral agreement and assignment of conditional sale of same date.

Default in the payment of any installment hereon shall render the unpaid balance on this note due and payable, and the owner or holder hereof may at any time thereafter sell all or any part of said collateral at public or private sale, with or without notice of the time and place of sale and without demand of performance.

The owner or holder of this note may buy any of said collateral at said sale, and the proceeds of the

sale shall be applied first to the payment of expenses of making such sale, including a reasonable attorney fee, if any attorney is employed; second, to the payment of the principal debt hereby secured and the interest thereon; third, to the payment of any other debt which the undersigned may now or hereafter owe the owner or holder of this note, either as principal, co-maker, surety, endorser, or otherwise, and if any surplus remains the same to be paid to the undersigned.

The makers, co-makers, endorsers, sureties or guarantors of this note each for himself, hereby severally agree to pay all costs of collecting or securing or attempting to collect or secure, this note, including a reasonable attorney fee, whether the same be collected or secured by suit or otherwise, and severally Waive, demand, presentment, protest and/or notice of protest, sale, demand or suit, and all other requirements necessary to hold them and agree that time of payment may be extended without notice to them of such extension. The owner or holder of this note is hereby authorized to apply, on or after maturity, to the payment of this note any funds in its possession belonging to the maker, co-maker, surety, endorser, guarantor or any one of them.

/s/ GEO. B. CAREY,
Maker.

EXHIBIT A-1

HILO FINANCE & THRIFT CO., LTD.

Note No. 796

Date of Note, 8/31/37. Date of Loan, 9/1/37.

Total Loan or face of Note.....		\$2,330.00
Interest deducted in advance.....	\$ 330.00	
Cash received by Defendant.....		
Paid on notes to Realty Investment Co.....		
Credited to pre-existing notes		
due to H. F. & T. Co., Ltd.....	2,000.00	2,330.00
	<hr/>	<hr/> <hr/>

Payments received by Plaintiff:

Date	Amount	
10/1/37.....	\$155.32	
11/2/37.....	155.32	
12/3/37.....	155.32	
1/4/38.....	155.32	
2/2/38.....	155.32	
3/8/38.....	155.32	
4/5/38.....	155.32	
5/4/38.....	155.32	
7/14/38.....	155.32	
9/28/38.....	155.32	
12/1/38.....	155.32	
12/1/38.....	155.32	
12/31/38.....	155.32	
	<hr/>	2,174.48
Unpaid Balance of total loan or face		
of note		155.52
		<hr/>
		\$2,330.00
		<hr/> <hr/>
Rebate of interest paid to Defendant	<hr/>	<hr/> <hr/>

EXHIBIT "B"

Collateral Note. No. 871. \$2,330.00

Oct. 1, 1937. Sept. 28, 1937

For value received, I, we, or either of us, jointly and severally promise to pay to the order of Hilo Finance and Thrift Company, Ltd., of Hilo, Hawaii, at their office the sum of Twenty-three Hundred Thirty and No/100 Dollars in 15 equal installments of \$155.32 each on the 28th of each month following the date of this note, with interest from maturity at the rate of% per annum until paid, with ten per cent additional on amount unpaid, if placed in the hands of an attorney for collection, having deposited with and pledged to said Finance Company, as collateral security for the payment of this note, and all other liabilities of the undersigned to the legal holder hereof, whether direct, contingent, heretofore or hereafter contracted, the following property, to-wit:

Secured by collateral agreement and assignment of conditional sale agreement of said date.

Default in the payment of any installment hereon shall render the unpaid balance on this note due and payable, and the owner or holder hereof may at any time thereafter sell all or any part of said collateral at public or private sale, with or without notice of the time and place of sale and without demand of performance.

The owner or holder of this note may buy any of said collateral at said sale, and the proceeds of the sale shall be applied first to the payment of expenses

of making such sale, including a reasonable attorney fee, if any attorney is employed; second, to the payment of the principal debt hereby secured and the interest thereon; third, to the payment of any other debt which the undersigned may now or hereafter owe the owner or holder of this note, either as principal, co-maker, surety, endorser, or otherwise, and if any surplus remains the same to be paid to the undersigned.

The makers, co-makers, endorsers, sureties or guarantors of this note each for himself, hereby severally agree to pay all costs of collecting or securing or attempting to collect or secure, this note, including a reasonable attorney fee, whether the same be collected or secured by suit or otherwise, and severally Waive demand, presentment, protest and/or notice of protest, sale, demand or suit, and all other requirements necessary to hold them and agree that time of payment may be extended without notice to them of such extension. The owner or holder of this note is hereby authorized to apply, on or after maturity, to the payment of this note any funds in its possession belonging to the maker, co-maker, surety, endorser, guarantor or any one of them.

/s/ GEO. B. CAREY,
Maker.

EXHIBIT B-1

HILO FINANCE & THRIFT CO., LTD.

Note No. 871

Date of Note, 9/28/37. Date of Loan, 10/1/37

Total Loan or face of Note.....		\$2,330.00
Interest deducted in advance.....	\$ 330.00	
Cash received by Defendant.....		
Paid on notes to Realty Investment Co.....		
Credited to pre-existing notes due to		
H. F. & T Co., Ltd.....	2,000.00	2,330.00
	<hr/>	<hr/>

Payments received by Plaintiff:

Date	Amount	
11/2/37.....	\$155.32	
12/2/37.....	155.32	
1/4/38.....	155.32	
2/2/38.....	19.36	
2/2/38.....	135.96	
3/8/38.....	155.32	
4/6/38.....	155.32	
5/4/38.....	155.32	
7/14/38.....	155.32	
8/27/38.....	155.32	
9/28/38.....	155.32	
12/1/38.....	155.32	
12/1/38.....	155.32	
12/31/38.....	155.32	
	<hr/>	2,019.16
Unpaid Balance of total loan or face		
of note		310.84

\$2,330.00

Rebate of interest paid to Defendant ———

EXHIBIT "C"

Collateral Note. No. 961. \$2,330.00

Nov. 2, 1937. October 29, 1937

For value received, I, we, or either of us, jointly and severally promise to pay to the order of Hilo Finance and Thrift Company, Ltd., of Hilo, Hawaii, at their office the sum of Twenty-three Hundred Thirty and No/100 Dollars in 15 equal installments of \$155.32 each on the 29th of each month following the date of this note, with interest from maturity at the rate of% per annum until paid, with ten per cent additional on amount unpaid, if placed in the hands of an attorney for collection, having deposited with and pledged to said Finance Company, as collateral security for the payment of this note, and all other liabilities of the undersigned to the legal holder hereof, whether direct, contingent, heretofore or hereafter contracted, the following property, to-wit:

Secured by collateral agreement and assignment of conditional sale of same date.

Default in the payment of any installment hereon shall render the unpaid balance on this note due and payable, and the owner or holder hereof may at any time thereafter sell all or any part of said collateral at public or private sale, with or without notice of the time and place of sale and without demand of performance.

The owner or holder of this note may buy any of said collateral at said sale, and the proceeds of the

sale shall be applied first to the payment of expenses of making such sale, including a reasonable attorney fee, if any attorney is employed; second, to the payment of the principal debt hereby secured and the interest thereon; third, to the payment of any other debt which the undersigned may now or hereafter owe the owner or holder of this note, either as principal, co-maker, surety, endorser, or otherwise, and if any surplus remains the same to be paid to the undersigned.

The makers, co-makers, endorsers, sureties or guarantors of this note each for himself, hereby severally agree to pay all costs of collecting or securing or attempting to collect or secure, this note, including a reasonable attorney fee, whether the same be collected or secured by suit or otherwise, and severally Waive demand, presentment, protest and/or notice of protest, sale, demand or suit, and all other requirements necessary to hold them and agree that time of payment may be extended without notice to them of such extension. The owner or holder of this note is hereby authorized to apply, on or after maturity, to the payment of this note any funds in its possession belonging to the maker, co-maker, surety, endorser, guarantor or any one of them.

/s/ GEO. B. CAREY,
Maker.

EXHIBIT C-1

HILO FINANCE & THRIFT CO., LTD.

Note No. 961

Date of Note, 10/29/37. Date of Loan, 11/2/37

Total Loan or face of Note.....		\$2,330.00
Interest deducted in advance.....	\$ 330.00	
Cash received by Defendant.....		
Paid on notes to Realty Investment Co.....		
Credited to pre-existing notes due to		
H. F. & T. Co., Ltd.....	2,000.00	2,330.00

Payments received by Plaintiff:

Date	Amount	
12/2/37.....	\$155.32	
1/4/38.....	155.32	
2/2/38.....	155.32	
3/8/38.....	19.36	
3/8/38.....	135.96	
4/6/38.....	155.32	
5/4/38.....	155.32	
7/14/38.....	155.32	
8/27/38.....	155.32	
9/28/38.....	155.32	
12/1/38.....	155.32	
12/1/38.....	155.32	
12/31/38.....	155.32	
		1,863.84
Unpaid balance of total loan or face of note		1,466.16
		2,330.00
Rebate of interest paid to Defendant	———	

EXHIBIT D

Collateral Note. No. 1006. \$2,330.00

Nov. 18, 1937. Nov. 17, 1937

For value received, I, we, or either of us, jointly and severally promise to pay to the order of Hilo Finance and Thrift Company, Ltd., of Hilo, Hawaii, at their office the sum of Twenty-three Hundred Thirty and No/100 Dollars in 15 equal installments of \$155.32 each on the 17th of each month following the date of this note, with interest from maturity at the rate of% per annum until paid, with ten per cent additional on amount unpaid, if placed in the hands of an attorney for collection, having deposited with and pledged to said Finance Company, as collateral security for the payment of this note, and all other liabilities of the undersigned to the legal holder hereof, whether direct, contingent, heretofore or hereafter contracted, the following property, to-wit:

Secured by conditional sales agreement.

Default in the payment of any installment hereon shall render the unpaid balance on this note due and payable, and the owner or holder hereof may at any time thereafter sell all or any part of said collateral at public or private sale, with or without notice of the time and place of sale and without demand of performance.

The owner or holder of this note may buy any of said collateral at said sale, and the proceeds of the sale shall be applied first to the payment of expenses

of making such sale, including a reasonable attorney fee, if any attorney is employed; second, to the payment of the principal debt hereby secured and the interest thereon; third, to the payment of any other debt which the undersigned may now or hereafter owe the owner or holder of this note, either as principal, co-maker, surety, endorser, or otherwise, and if any surplus remains the same to be paid to the undersigned.

The makers, co-makers, endorsers, sureties or guarantors of this note each for himself, hereby severally agree to pay all costs of collecting or securing or attempting to collect or secure, this note, including a reasonable attorney fee, whether the same be collected or secured by suit or otherwise, and severally Waive demand, presentment, protest and/or notice of protest, sale, demand or suit, and all other requirements necessary to hold them and agree that time of payment may be extended without notice to them of such extension. The owner or holder of this note is hereby authorized to apply, on or after maturity, to the payment of this note any funds in its possession belonging to the maker, co-maker, surety, endorser, guarantor or any one of them.

/s/ GEO. B. CAREY,
Maker.

EXHIBIT D-1

HILO FINANCE & THRIFT CO., LTD.

Note No. 1006

Date of Note, 11/17/37. Date of Loan, 11/18/37

Total Loan or face of Note.....	\$2,330.00
Interest deducted in advance.....	\$ 330.00
Cash received by Defendant.....	2,000.00
Paid on notes to Realty Investment Co.....	
Credited to pre-existing notes due to H. F. & T. Co., Ltd.....	2,330.00
	<hr/>

Payments received by Plaintiff:

Date	Amount
1/4/38.....	\$155.32
2/2/38.....	155.32
3/8/38.....	155.32
4/6/38.....	155.32
4/6/38.....	19.36
5/4/38.....	155.32
7/14/38.....	155.32
8/27/38.....	155.32
9/28/38.....	155.32
12/1/38.....	155.32
12/1/38.....	155.32
12/31/38.....	155.32
	<hr/>
	1,708.52

Unpaid Balance of total loan or face of note.....	621.48
	<hr/>
	\$2,330.00
	<hr/>

Rebate of interest paid to Defendant	<hr/>
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EXHIBIT "E"

Collateral Note. No. 1043. \$2,330.00

Dec. 2, 1937. November 30, 1937

For value received, I, we, or either of us, jointly and severally promise to pay to the order of Hilo Finance and Thrift Company, Ltd., of Hilo, Hawaii, at their office the sum of Twenty-three Hundred Thirty and No/100 Dollars in 15 equal installments of \$155.32 each on the 30th of each month following the date of this note, with interest from maturity at the rate of% per annum until paid, with ten per cent additional on amount unpaid, if placed in the hands of an attorney for collection, having deposited with and pledged to said Finance Company, as collateral security for the payment of this note, and all other liabilities of the undersigned to the legal holder hereof, whether direct, contingent, heretofore or hereafter contracted, the following property, to-wit:

Secured by collateral agreement and assignment of conditional sale agreement of same date.

Default in the payment of any installment hereon shall render the unpaid balance on this note due and payable, and the owner or holder hereof may at any time thereafter sell all or any part of said collateral at public or private sale, with or without notice of the time and place of sale and without demand of performance.

The owner or holder of this note may buy any of said collateral at said sale, and the proceeds of the

sale shall be applied first to the payment of expenses of making such sale, including a reasonable attorney fee, if any attorney is employed; second, to the payment of the principal debt hereby secured and the interest thereon; third, to the payment of any other debt which the undersigned may now or hereafter owe the owner or holder of this note, either as principal, co-maker, surety, endorser, or otherwise, and if any surplus remains the same to be paid to the undersigned.

The makers, co-makers, endorsers, sureties or guarantors of this note each for himself, hereby severally agree to pay all costs of collecting or securing or attempting to collect or secure, this note, including a reasonable attorney fee, whether the same be collected or secured by suit or otherwise, and severally Waive demand, presentment, protest and/or notice of protest, sale, demand or suit, and all other requirements necessary to hold them and agree that time of payment may be extended without notice to them of such extension. The owner or holder of this note is hereby authorized to apply, on or after maturity, to the payment of this note any funds in its possession belonging to the maker, co-maker, surety, endorser, guarantor or any one of them.

/s/ GEO. B. CAREY,
Maker.

EXHIBIT E-1

HILO FINANCE & THRIFT CO., LTD.

Note No. 1043

Date of Note, 11/30/37. Date of Loan, 12/2/37

Total Loan or face of Note.....		\$2,330.00
Interest deducted in advance.....	\$ 330.00	
Cash received by Defendant.....		
Paid on notes to Realty Investment Co.....		
Credited to pre-existing notes due to H. F. & T. Co., Ltd.....	2,000.00	2,330.00
	<hr/>	<hr/> <hr/>

Payments received by Plaintiff:

Date	Amount	
1/4/38.....	\$155.12	
1/4/38.....	.20	
2/2/38.....	77.66	
3/8/38.....	232.78	
4/6/38.....	155.32	
5/4/38.....	19.36	
5/4/38.....	135.96	
7/14/38.....	19.36	
7/14/38.....	135.96	
8/27/38.....	155.52	
9/28/38.....	155.32	
12/1/38.....	155.32	
12/1/38.....	155.32	
12/31/38.....	155.32	
	<hr/>	1,708.52
Unpaid Balance of total loan or face of note		621.38
		<hr/>
		\$2,330.00
		<hr/> <hr/>
Rebate of interest paid to Defendant		<hr/> <hr/>

EXHIBIT "F"

Collateral Note. No. 1173. \$2,330.00

Jan 4, 1938. December 31, 1937

For value received, I, we, or either of us, jointly and severally promise to pay to the order of Hilo Finance and Thrift Company, Ltd., of Hilo, Hawaii, at their office the sum of Twenty-three Hundred Thirty and No/100 Dollars in 15 equal installments of \$155.32 each on the 31st of each month following the date of this note, with interest from maturity at the rate of% per annum until paid, with ten per cent additional on amount unpaid, if placed in the hands of an attorney for collection, having deposited with and pledged to said Finance Company, as collateral security for the payment of this note, and all other liabilities of the undersigned to the legal holder hereof, whether direct, contingent, heretofore or hereafter contracted, the following property, to-wit:

Secured by collateral agreement and assignment of conditional sale agreement of same date.

Default in the payment of any installment hereon shall render the unpaid balance on this note due and payable, and the owner or holder hereof may at any time thereafter sell all or any part of said collateral at public or private sale, with or without notice of the time and place of sale and without demand of performance.

The owner or holder of this note may buy any of said collateral at said sale, and the proceeds of the

sale shall be applied first to the payment of expenses of making such sale, including a reasonable attorney fee, if any attorney is employed ; second, to the payment of the principal debt hereby secured and the interest thereon ; third, to the payment of any other debt which the undersigned may now or hereafter owe the owner or holder of this note, either as principal, co-maker, surety, endorser, or otherwise, and if any surplus remains the same to be paid to the undersigned.

The makers, co-makers, endorsers, sureties or guarantors of this note each for himself, hereby severally agree to pay all costs of collecting or securing or attempting to collect or secure, this note, including a reasonable attorney fee, whether the same be collected or secured by suit or otherwise, and severally Waive demand, presentment, protest and/or notice of protest, sale, demand or suit, and all other requirements necessary to hold them and agree that time of payment may be extended without notice to them of such extension. The owner or holder of this note is hereby authorized to apply, on or after maturity, to the payment of this note any funds in its possession belonging to the maker, co-maker, surety, endorser, guarantor or any one of them.

/s/ GEO. B. CAREY,
Maker.

EXHIBIT F-1

HILO FINANCE & THRIFT CO., LTD.

Note No. 1173

Date of Note, 12/31/37. Date of Loan, 1/4/38

Total Loan or face of Note.....		\$2,330.00
Interest deducted in advance.....	\$ 330.00	
Cash received by Defendant.....		
Paid on notes to Realty Investment Co.....		
Credited to pre-existing notes due to H. F. & T. Co., Ltd.....	2,000.00	2,330.00
	<hr/>	<hr/> <hr/>

Payments received by Plaintiff:

Date	Amount	
3/8/38.....	\$310.84	
4/6/38.....	155.32	
5/4/38.....	155.32	
7/14/38.....	155.32	
8/27/38.....	155.12	
9/28/38.....	155.32	
12/1/38.....	155.32	
12/1/38.....	155.32	
12/31/38.....	155.32	
	<hr/>	1,553.20

Unpaid Balance of total loan or face of note.....	776.80
--	--------

\$2,330.00

Rebate of interest paid to Defendant ———

EXHIBIT "G"

Collateral Note. No. 1234. \$2,330.00

Feb. 2, 1938. January 31, 1938

For value received, I, we, or either of us, jointly and severally promise to pay to the order of Hilo Finance and Thrift Company, Ltd., of Hilo, Hawaii, at their office the sum of Twenty-three Hundred Thirty and No/100 Dollars in 15 equal installments of \$155.32 each on the 30th of each month following the date of this note, with interest from maturity at the rate of% per annum until paid, with ten per cent additional on amount unpaid, if placed in the hands of an attorney for collection, having deposited with and pledged to said Finance Company, as collateral security for the payment of this note, and all other liabilities of the undersigned to the legal holder hereof, whether direct, contingent, heretofore or hereafter contracted, the following property, to-wit:

Secured by collateral agreement and assignment of conditional sale agreement of same date.

Default in the payment of any installment hereon shall render the unpaid balance on this note due and payable, and the owner or holder hereof may at any time thereafter sell all or any part of said collateral at public or private sale, with or without notice of the time and place of sale and without demand of performance.

The owner or holder of this note may buy any of said collateral at said sale, and the proceeds of the sale shall be applied first to the payment of expenses

of making such sale, including a reasonable attorney fee, if any attorney is employed; second, to the payment of the principal debt hereby secured and the interest thereon; third, to the payment of any other debt which the undersigned may now or hereafter owe the owner or holder of this note, either as principal, co-maker, surety, endorser, or otherwise, and if any surplus remains the same to be paid to the undersigned.

The makers, co-makers, endorsers, sureties or guarantors of this note each for himself, hereby severally agree to pay all costs of collecting or securing or attempting to collect or secure, this note, including a reasonable attorney fee, whether the same be collected or secured by suit or otherwise, and severally Waive demand, presentment, protest and/or notice of protest, sale, demand or suit, and all other requirements necessary to hold them and agree that time of payment may be extended without notice to them of such extension. The owner or holder of this note is hereby authorized to apply, on or after maturity, to the payment of this note any funds in its possession belonging to the maker, co-maker, surety, endorser, guarantor or any one of them.

/s/ GEO. B. CAREY,
Maker.

EXHIBIT G-1

HILO FINANCE & THRIFT CO., LTD.

Note No. 1234

Date of Note, 1/31/38. Date of Loan, 2/2/38

Total Loan or face of Note.....		\$2,330.00
Interest deducted in advance.....	\$ 330.00	
Cash received by Defendant.....		
Paid on notes to Realty Investment Co.....		
Credited to pre-existing notes due to		
H. F. & T. Co., Ltd.....	2,000.00	2,330.00
	<hr/>	<hr/> <hr/>

Payments received by Plaintiff:

Date	Amount	
3/8/38.....	\$155.32	
4/6/38.....	155.32	
5/4/38.....	155.32	
7/14/38.....	155.32	
8/27/38.....	155.32	
9/28/38.....	155.32	
12/1/38.....	155.32	
12/1/38.....	155.32	
12/31/38.....	155.32	
	<hr/>	1,397.88
Unpaid Balance of total loan or face		
of note.....		932.12
		<hr/>
		\$2,330.00
		<hr/> <hr/>
Rebate of interest paid to Defendant	<hr/>	<hr/> <hr/>

EXHIBIT "H"

Collateral Note. No. 1354. \$2,330.00

Mar. 8, 1938. February 28, 1938

For value received, I, we, or either of us, jointly and severally promise to pay to the order of Hilo Finance and Thrift Company, Ltd., of Hilo, Hawaii, at their office the sum of Twenty-three Hundred Thirty and No/100 Dollars in 15 equal installments of \$155.32 each on the 28th of each month following the date of this note, with interest from maturity at the rate of% per annum until paid, with ten per cent additional on amount unpaid, if placed in the hands of an attorney for collection, having deposited with and pledged to said Finance Company, as collateral security for the payment of this note, and all other liabilities of the undersigned to the legal holder hereof, whether direct, contingent, heretofore or hereafter contracted, the following property, to-wit:

Secured by collateral agreement and assignment of conditional sale agreement of same date.

Default in the payment of any installment hereon shall render the unpaid balance on this note due and payable, and the owner or holder hereof may at any time thereafter sell all or any part of said collateral at public or private sale, with or without notice of the time and place of sale and without demand of performance.

The owner or holder of this note may buy any of said collateral at said sale, and the proceeds of the

sale shall be applied first to the payment of expenses of making such sale, including a reasonable attorney fee, if any attorney is employed; second, to the payment of the principal debt hereby secured and the interest thereon; third, to the payment of any other debt which the undersigned may now or hereafter owe the owner or holder of this note, either as principal, co-maker, surety, endorser, or otherwise, and if any surplus remains the same to be paid to the undersigned.

The makers, co-makers, endorsers, sureties or guarantors of this note each for himself, hereby severally agree to pay all costs of collecting or securing or attempting to collect or secure, this note, including a reasonable attorney fee, whether the same be collected or secured by suit or otherwise, and severally Waive demand, presentment, protest and/or notice of protest, sale, demand or suit, and all other requirements necessary to hold them and agree that time of payment may be extended without notice to them of such extension. The owner or holder of this note is hereby authorized to apply, on or after maturity, to the payment of this note any funds in its possession belonging to the maker, co-maker, surety, endorser, guarantor or any one of them.

/s/ GEO. B. CAREY,
Maker.

EXHIBIT H-1

HILO FINANCE & THRIFT CO., LTD.

Note No. 1354

Date of Note, 2/28/38. Date of Loan, 3/8/38

Total Loan or face of Note.....		\$2,330.00
Interest deducted in advance.....	\$ 330.00	
Cash received by Defendant.....		
Paid on notes to Realty Investment Co.....		
Credited to pre-existing notes due to H. F. & T. Co., Ltd.....	2,000.00	2,330.00
	<hr/>	<hr/> <hr/>

Payments received by Plaintiff:

Date	Amount	
4/6/38.....	\$155.32	
5/4/38.....	155.32	
7/14/38.....	155.32	
8/27/38.....	155.32	
9/28/38.....	155.32	
12/1/38.....	155.32	
12/1/38.....	155.32	
12/31/38.....	155.32	
	<hr/>	1,242.56
Unpaid Balance of total loan or face of note		1,087.44
		<hr/> <hr/>
		\$2,330.00
		<hr/> <hr/>
Rebate of interest paid to Defendant	<hr/>	<hr/> <hr/>

[Endorsed]: Received and filed in the Supreme
Court July 31, 1944. Chas. H. K. Holt, Clerk.

PLAINTIFF'S EXHIBIT I

HILO FINANCE & THRIFT CO., LTD.

Calculation on hypothetical question on the loan of \$6942.52 of principal:

\$1000.00	\$ 1000.00
922.34	1922.34
844.68	2767.02
767.02	3534.04
689.36	4223.40
611.70	4835.10
534.04	5369.14
456.38	5285.52
378.72	6204.24
301.06	6505.30
223.40	6728.70
145.74	6874.44
68.08	6942.52
<hr/>	<hr/>
6942.52	62731.76

PLAINTIFF'S EXHIBIT J

Loan of \$1,165.00 for 15 months; Interest, \$165.00; 14 installments, \$77.67; 1 installment, \$77.62.

Cash out	\$1,000.00	Interest	Total
Payment 1	57.67	\$ 20.00	\$ 77.67
	<u>\$ 942.33</u>		
Payment 2	58.82	18.85	77.67
	<u>\$ 883.51</u>		
Payment 3	60.00	17.67	77.67
	<u>\$ 823.51</u>		
Payment 4	61.20	16.47	77.67
	<u>\$ 762.31</u>		
Payment 5	62.42	15.25	77.67
	<u>\$ 699.89</u>		
Payment 6	63.67	14.00	77.67
	<u>\$ 636.22</u>		
Payment 7	64.95	12.72	77.67
	<u>\$ 571.27</u>		
Payment 8	66.24	11.43	77.67
	<u>\$ 505.03</u>		
Payment 9	67.57	10.10	77.67
	<u>\$ 437.46</u>		
Payment 10	68.92	8.75	77.67
	<u>\$ 368.54</u>		
Payment 11	70.30	7.37	77.67
	<u>\$ 298.24</u>		
Payment 12	71.71	5.96	77.67
	<u>\$ 226.53</u>		
Payment 13	73.14	4.53	77.67
	<u>\$ 153.39</u>		
Payment 14	74.60	3.07	77.67
	<u>\$ 78.79</u>		
Payment 15	76.05	1.57	77.67
	<u>\$ 2.74</u>	<u>\$167.74</u>	<u>\$1,165.00</u>

This Exhibit shows that the rate is slightly less than 2% per month (omitting rebate) as, if it had been 2%, there would have been \$2.74 still to pay.

PLAINTIFF'S EXHIBIT K

November 29, 1938

Hilo Finance & Thrift Company
Hilo, Hawaii,

Gentlemen:

Enclosed you will find our check in the amount of \$4,349.36 which is to cover repayment on loan for the months of August and September. We are making plans which we trust will materialize the early part of December that will enable us to make up the payments due your firm for the months of October and November thus bringing the account up to date. If for some reason we are unable to make the two payments, we will at least make the one.

Circumstances over which I had no control, involving a new arrangement which was to have permitted me to have made my payments to you as was agreed upon but an unexpected delay was brought about by the attorneys not preparing the necessary documents which in turn caused me to fall behind with my obligations to you which in turn gave you the privilege of deducting certain rebates of which prior to any delinquency, you were returning to me under our agreement.

However, it is my opinion that there were certain portions of the rebates that were earned by reason of having met payments according to agreement and that by so doing that portion of the rebates so earned should have been credited to us. In other

words, if you wished to exercise your right to withhold rebates, then it would seem that if you withheld only such rebates that would apply to the monthly payments that were actually in default, giving me credit for all rebates on such payments that were made according to agreement, up to the time that I defaulted and became delinquent with these payments, would, in my opinion, be the more equitable way to handle this subject.

I am mailing Mr. Tennant a copy of this letter, asking him to go over the attached schedule covering the various notes of which payments were made satisfactorily and which shows the amount of earned rebate which has been prepared in accordance with above explanation. Since Mr. Tennant is leaving shortly for Hilo, it will give your firm and he a few days to consider my request and trust that in view of the many years of our dealings, all of which I was able to meet my obligations satisfactorily to you, this being the only case of defaultation, any consideration that you are inclined to extend me, I assure you, will be greatly appreciated.

Yours very truly,

GEO. B. CAREY, Manager,
White Sewing Machine Agency.

GBC:PM

PLANTIFF'S EXHIBIT L

Collateral Form for Pledging of Contracts

Return of collateral transferred and delivered to the Bank of Hawaii by Geo. B. Carey under terms of agreement dated September 10, 1936, between Geo. B. Carey, Bank of Hawaii, White Sewing Machine Company (Cleveland) and Discount Corporation, Ltd.

Estimation of amount due by purchasers under installment contracts assigned for November 1st, 1938.

Value of Collateral estimated at last report Oct. 1st, 1938.....		\$176,847.96
Add: New Contracts delivered during Month.....		11,403.23
		<hr/>
Total		\$188,251.19
Less: Total Collections on Contracts	\$ 13,474.66	
Less: Collected on Island of Hawaii contracts assigned to Hilo Finance & Thrift Co., Ltd.....	\$2,449.20	
Collected on other contracts assigned..	288.60	2,837.80
		<hr/>
Net Collections on contracts assigned to Bank of Hawaii.....	\$ 10,636.86	
Amounts due under Collateral withdrawn by reason of repossession or uncollectibility		3,492.06
		<hr/>
Total Deductions.....		14,128.92
		<hr/>

Value of Collateral at Nov. 1, 1938....	\$174,122.27
Considered as Class "A" 93.24%....	163,122.46
Considered as Class "B" 6.76%....	\$ 10,999.81

Note: Percentages as established last Auditor's Report

Loan from Bank of Hawaii.....	\$ 25,000.00
Loan from White Sewing Machine Co.	18,953.28
Loan from Discount Corp. Ltd.....	7,169.99

Total Loans	\$ 51,123.27
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Collateral at Bank of Hawaii consid- ered Class "A" 93.24%.....	\$163,122.46
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Collateral requirement ratio.

Over all $2\frac{1}{2}$ times amount.....	127,808.17
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Collateral over requirement.....	\$ 35,314.29
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The aggregate balance of Collateral at November 1st, 1938 amounted to \$209,760.13 was distributed as follows:

Bank of Hawaii.....	\$174,122.27
Hilo Finance & Thrift Co., Ltd.....	34,705.40
Geo. B. Carey.....	932.46

Total	\$209,760.13
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[Endorsed]: Filed June 22, 1943.

[Title of Circuit Court and Cause.]

ANSWER SET OFF COUNTER CLAIM

Comes Now George B. Carey, defendant, and for answer, admits, denies and alleges:

I.

Admits the matter contained in Paragraph 1 of the Amended Declaration, as to corporate existence to plaintiff.

II.

Denies each and every allegation of fact contained in each "Cause of Action" and each "Count" of the said Amended Declaration.

And for a Set Off and Counterclaim Defendant Alleges:

I.

That on or about November 21, 1933, and at all times herein mentioned since that date, Plaintiff herein, was engaged in the business of lending money at interest in Hilo, Territory of Hawaii.

II.

That on or about November 21, 1933, Defendant entered into negotiations with Plaintiff to obtain the loan of money from the said organization and, thereafter entered into an oral financing agreement with said Plaintiff whereby the said Plaintiff agreed to loan money on open account on certain collateral security as needed by the said defendant, the loans, as made, to be evidenced by promissory notes in the form attached as exhibits to the Amended Declaration.

III.

That thereafter about April 18, 1934, Defendant commenced borrowing money from the said Defendant pursuant to the said agreement, and thereafter did continuously borrow and repay loans by Plaintiff upon an open account for money had and received and executed notes for the sums so borrowed, to a total of \$104,850.00 face value of notes executed for a total cash received of \$17,973.32. That upon all of the loans so made there was charged by the Plaintiff against the Defendant interest at a rate greater than 2 per cent per month, which was included in the face value of each note so executed.

IV.

That Defendant repaid to the Plaintiff the entire principal sum of said loans on or before December 30, 1938, by paying to the said Plaintiff the total sum of \$23,161.94 of which sum \$6,188.62 was paid on the usurious interest charged as aforesaid.

V.

That as set forth above, Defendant has wholly paid all moneys borrowed under the loan contract heretofore set forth and in addition has been mulcted of criminal usury to Plaintiff in the sum of \$6,188.62.

VI.

That at all times mentioned herein wherein Plaintiff loaned money to Defendant, the said Hilo Finance and Thrift Company, Limited, has been a licensed money lender under the terms of Chapter

233, Revised Laws of Hawaii, 1935, as amended by the Session Laws of 1937.

Wherefore Defendant prays that the Plaintiff take nothing by his declaration and that judgment issue herein for Defendant for \$6,188.62 with interest from December 30, 1938, together with his costs, expenses, and attorney fees.

/s/ GEO. B. CAREY.

County of Hawaii,
Territory of Hawaii—ss.

George B. Carey, being first duly sworn, says: That he is the defendant in the above entitled action; that he has read the foregoing Answer, Set Off and Counter Claim and that the same is true.

/s/ GEO. B. CAREY.

Subscribed and sworn to before me this 24th day of June, 1943.

[Seal] /s/ WILLIAM R. WHITTINGTON,
Ass't Clerk 3rd Circuit Court,
T. H.

Notice is hereby given that, among other defenses, Defendant will present and rely upon the following defenses:

1. Payment.
2. Lack of Consideration.
3. Usury—both civil and criminal.
4. Illegality.
5. Fraud.

PHIL CASS,
Attorney for Defendant.

[Endorsed]: Filed June 24, 1943.

[Title of Circuit Court and Cause.]

ANSWER TO SET OFF AND COUNTER
CLAIM

Comes now Hilo Finance and Thrift Company, Limited, plaintiff herein, by and through its attorneys, Carlsmith & Carlsmith and Messrs. Smith, Wild, Beebe and Cades, and for answer to the Set Off and Counter Claim filed herein denies each and every allegation therein contained.

And Plaintiff, pursuant to rule of Court, hereby gives notice that it will and does hereby rely on the defense of illegality, payment and Statute of Limitations.

And for further answer the plaintiff alleges and shows unto this Honorable Court that it is a corporation which, at all times mentioned in said Set Off and Counter Claim, was duly licensed under Act 154 of the Session Laws of Hawaii, 1933, and under Act 231, Series D-140, Session Laws of Hawaii, 1937, and that the claim set forth in said Set Off and Counter Claim is wholly barred under the provisions of Act 75 of the Session Laws of Hawaii, 1939.

Dated at Hilo, Hawaii, this 26th day of June, 1943.

HILO FINANCE AND THRIFT
COMPANY, LIMITED,

Plaintiff.

By CARLSMITH & CARLSMITH
and SMITH, WILD, BEEBE &
CADES,

Its Attorneys.

By /s/ J. RUSSELL CADES.

[Endorsed]: Filed June 26, 1943.

In the Circuit Court of the Third Judicial Circuit,
Territory of Hawaii

Law 2316

HILO FINANCE & THRIFT COMPANY,
LIMITED,

Plaintiff,

vs.

GEORGE B. CAREY,

Defendant,

BANK OF HAWAII, and BISHOP NATIONAL
BANK OF HAWAII,

Garnishees.

ACTION IN ASSUMPSIT WITH GARNISH-
MENT AND ATTACHMENT IN AID

TRANSCRIPT

Carlsmith & Carlsmith, Smith, Wild, Beebe &
Cades, Attorneys for Plaintiff.

Willson C. Moore, Cass & Silver, Attorneys for
Defendant.

(Pages 1 to 18 and first 8 lines of page 19
omitted.)

Mr. Cades: We will then proceed. In the case in
chief it has been stipulated between parties that the
plaintiff is a corporation duly organized and exist-
ing under the laws of the Territory of Hawaii.

Mr. Moore: Yes, that is correct.

Mr. Cades: It is also stipulated that at all times mentioned in the pleading the plaintiff was duly licensed under Act 154, Session Laws of Hawaii, 1933, which is the Money Lenders Act, and under Act 231, Series D 140, Session Laws of Hawaii, 1937, which is the Industrial Loan Company Act.

Mr. Moore: That is correct.

Mr. Cades: Mr. Tennent, will you take the witness stand?

HUGH COPPER TENNENT

a witness for the plaintiff, who, being first duly sworn, testified as follows:

Direct Examination

By Mr. Cades:

Q. Will you state your name, please?

A. Hugh Copper Tennent.

Q. What is your occupation, Mr. Tennent?

A. Certified Public Accountant.

Q. How long have you been a certified public accountant? A. Since 1925.

Q. That is you are a certified public accountant under the laws of the Territory of Hawaii?

A. Yes, since 1925.

Q. Will you state whether you have ever acted as auditor for the Hilo Finance & Thrift Company, Limited? A. Yes.

Q. You have and if so, what period?

A. 1927 to date.

(Testimony of Hugh Copper Tennent.)

Q. And have you acted as auditor for George B. Carey the defendant in this case? A. Yes.

Q. State what period. A. 1932 to 1939.

Q. Are you familiar with the signature of George B. Carey the defendant in this case?

A. Yes, sir.

Q. I hand you eight notes which are numbered as follows: 796, 871, 961, 1006, 1043, 1173, 1234, 1354, all in the face amount of \$23,030 purporting to be signed by George B. Carey and I ask you to examine those. Have you examined those notes, Mr. Tennent? A. Yes.

Q. Can you state whether that is the signature of George B. Carey, the defendant in this case?

A. Yes, it is the signature of George B. Carey.

Mr. Cades: Your Honor, please, I ask that these be marked and introduced in evidence and be marked as an exhibit in this cause.

The Court: That may be received in evidence and marked Plaintiff's Exhibit A.

Mr. Cades: Would your Honor object to calling it A B C D as set up in the petition?

The Court: That is all right.

Mr. Cades: It would be then A to H inclusive. At this point to save time and expense incidental to prove the books and records, the parties have entered into a stipulation with respect to these notes introduced in evidence. That stipulation is as follows: That sheet has been prepared for each note number introduced in evidence and on the sheet is shown the facts that have been agreed to between

(Testimony of Hugh Copper Tennent.)

the parties with respect to each note. These facts are as follows: First, the note number; second, date of the date; third, the date of the loan; fourth, the total loan or face of the note; fifth, the amount of the interest which was deducted in advance; sixth, cash, if any received by defendant; seventh, amount of proceeds that were paid to the Realty Investment Company; next the amount of proceeds credited to pre-existing notes due to Hilo Finance & Thrift Company and thereunder a statement of all payments received by plaintiff and statement of unpaid balance of total loan or face of note and statement of rebate and interest, if there was a rebate of interest. In this connection we would offer as part of this stipulation we would offer these statements and ask that each one of them be marked A1 and B and so forth.

The Court: They may be received in evidence and so marked.

Mr. Moore: That is the stipulation. Your Honor, with reference to that I think the idea of marking them A1 and attaching them to each of the notes would keep them in better order for the court.

The Court: Mr. Clerk, will you attach them?

Mr. Cades: It is further stipulated that the plaintiff has demanded payment of the defendant of the amount as shown and that payment has not been made.

Mr. Moore: That is agreed.

(Testimony of Hugh Copper Tennent.)

Q. Now, Mr. Tennent, will you state what your training has been to qualify you to be a certified public accountant?

A. I was a registered accountant or what corresponds to a certified public accountant of New Zealand in 1909, the actual title being Fellow Public Accountant. It is on that presentation of those facts and my experience and examination papers and so on that I was admitted as a CPA and also a member of the American Institute of Accountants which is the only National body of recognized professional accountants.

Q. Now, Mr. Tennent, in the practice of your profession you have specialized in finance companies and installment sales companies have you?

A. Yes, sir.

Q. Will you state whether or not it is a fact that you have represented or did you represent a substantial number of finance companies operating in the Territory of Hawaii?

A. Yes, I do or have.

Q. Will you state what those finance companies are?

A. Hilo Finance & Thrift Company, Discount Corporation, Service Finance Company. I have been consulted by many others. Those are the three at the present time.

Q. And you act as consultant for many other finance companies? A. Yes.

Q. And you also have to do with the setting up of finance companies systems? A. Yes.

(Testimony of Hugh Copper Tennent.)

Q. Are you familiar with the agreement that was entered into between Hilo Finance Thrift Company and George B. Carey for the lending of money? A. Yes.

Q. Will you state how you are familiar with that?

A. All the arrangements of this borrowing were made by me in consultation with Carey and the treasurer of the Hilo Finance & Thrift Company.

Q. Have you acted as, all during the course of this account as auditor for both companies?

A. Right up to 1939 I have acted as auditor for both parties.

Q. Will you state to the court what the arrangement was for the lending of money?

A. The arrangement was that Mr. Carey should borrow a subsequent sum a month with interest deducted which would give him the cash that he needed to finance his business in Hilo.

Q. All right now, calling your attention specifically to the notes which had been introduced in this cause, will you state what the arrangement was with respect to the borrowing represented by those notes?

A. Yes, in the beginning the notes were prepared in Hilo and sent to Mr. Carey for signature. When they returned cash would be sent in. This proved to be a cumbersome arrangement because of the mere delays so that Mr. Carey was given a large quantity of blank notes which he signed when he wanted to borrow and send them to the Hilo

(Testimony of Hugh Copper Tennent.)

Finance & Thrift Company. Whereupon they drew the check or prepared the card, prepared the note card and drew the check or made the payment. There was generally a lag which was shown on the form of a day or two. Sometimes several days between the date of the note and the time the loan was made, but the arrangement made was that there were to be 15 installments on every loan. No loan at any time was for any different arrangement than for 15 months, and these installments were to be paid monthly on the date the actual loan was made. There was some question of the rebate that the interest figured on the face of the note and deducted was according to their regular charge which provided for a rebate after the note was paid according to the, according to the arrangement.

Q. In connection with the payment of deduction of interest in advance will you state to the court what the amount of interest was and how it was computed, do you know?

A. It was computed on the face of the note and deducted. On a \$2330 note, the interest deducted would be \$330.

Q. And the monthly installments according to the arrangement then would be due on the day of the month in which the actual loan was consummated in Hilo, is that the correct testimony?

A. Yes, sir.

Q. And what was the understanding with respect to the rebates of interest specifically in amount?

(Testimony of Hugh Copper Tennent.)

A. The first rebate was according to the regular practice which was \$27.14 per \$1165 note. I think I would like to check that note to see if it was \$27.16. \$27.18.

Q. On those \$1165?

A. On \$1165 which would be on a loan of \$2330, a rebate of \$54.36.

Q. And then was the amount of that rebate increased at a later time, I mean the agreement?

A. Yes, the rebate was very shortly after the beginning increased to be \$82.50 on a \$2330 loan.

Q. Now, limiting the increase to the notes which have been introduced in evidence beginning with the note dated August 31, 1937, what was the agreement concerning the rebate as to those notes in 1937, do you recall?

A. Yes, sir.

Q. What was the amount of that rebate?

A. The rebate agreed to on those was \$110.

Q. That is equal to one-third of the interest.

A. One-third of the prepaid interest.

Q. Will you state what the conditions were upon which the rebate was to be made?

A. The rebate was to be made for regular performance on the note. It should be said that there was not very strict, the few days delinquency in the past had never been considered the cause for denying a rebate.

Q. So that as this note was, taking one note, the first note in the series, as it was executed what was the total interest agreed to be paid assuming that prompt performance was made by the borrower?

(Testimony of Hugh Copper Tennent.)

Mr. Moore: I object to that as incompetent, irrelevant and immaterial. The rebate has nothing to do with this. This is a contract, may it please the Court, calling for payment of certain amount of interest.

(Argument.)

The Court: I will allow the question.

Mr. Moore: May I have an exception?

The Court: Yes.

A. It would be \$220.

Q. That is under the agreement of the parties as you understood it and negotiated. By the way, did you negotiate this agreement for both parties?

A. I did.

Q. And you are familiar with all details of it?

A. I am familiar with all details of it.

Q. Part of it is represented by promissory notes and part of it is oral understanding, that is correct?

A. Yes, that is correct.

Q. And these rebates were actually——

Mr. Moore: May it please the Court, may I have a continued objection and exception?

The Court: Yes, it is understood that you will have a running objection.

Mr. Moore: Very well.

Q. You state whether in fact under the dealings between these parties rebates had been in effect been paid, had been paid prior to the notes in evidence? A. Yes, sir.

Q. They had been. Now, I direct you to a single note taking into examination No. 796, have you at

(Testimony of Hugh Copper Tennent.)

my request—I show you note No. 796 which is introduced in evidence marked Exhibit A and a statement of the facts concerning that note introduced in evidence by stipulation being A-1, I ask you whether you have computed at my request the rate of interest contracted to be paid by the borrower?

Mr. Moore: If his answer is yes, or no, I have no objection.

Q. First answer yes, or no? A. Yes.

Q. Will you state what the rate of interest is based on the contract which you have testified to?

Mr. Moore: May it please the Court, we object to that as this is a mathematical computation and is not the preference of an expert to testify. It is a matter of mathematical computation that your Honor can figure out on the ruling that is laid down by law and that it is an attempt on the part of the plaintiff here to sue on the prerogative of the court.

The Court: I will allow the question. It won't do any harm.

Mr. Moore: May I have an exception?

The Court: Yes.

Mr. Moore: And to this same line of questioning.

The Court: Yes.

A. Under the Industrial Loan Act a charge of 1 per cent a month deducted in advance is permitted. That rate would be \$349.50. That is on this particular note. However, that is calculated if the note is \$2330, one per cent a month would be \$23.30, 15 times \$23.30 would be \$349.50, the actual inter-

(Testimony of Hugh Copper Tennent.)

est. Deducted in advance was \$330 a little less. If the rebate is deducted the calculation of the interest rate is what is \$220 to the sum borrowed gives a rate of 14.162 per cent per annum.

Q. Computed on what?

A. Computed on the declining balances of perfect performance.

Q. So that as I understand it your answer to the question as to what the rate is, it is a mathematical computation of what the effective rate is on the contract as entered into if perfectly performed. Your answer is 14.162 per cent?

A. Yes.

Assuming that no rebate were allowed and the borrower still performed in accordance with the contract, what would be the effective rate according to the mathematical computation?

A. 21.24 per cent.

Q. Per annum computed on what?

A. Computed on declining balances?

Q. Will you explain to the Court how you made the computation in the first instance of, let's take that one first 14.162 per cent?

A. Yes, supposing somebody borrowed \$20 from me one month and paid back \$10 and owed me \$10 for the account. That is equivalent to borrowing \$30 for a month and the bank rights and calculation are all based on that basis. That is obvious, \$20 was owed for one month and \$10. Now assuming that this note, I have the note in question because it shows the balance so I——

(Testimony of Hugh Copper Tennent.)

The Court: That is the note dated August 31.

A. August 31, 1937.

Q. Maybe I can make it simpler by restating my question. Is your computation of 14.162 per cent if that rate is applied to the actual balance outstanding each month and the payments are first applied on interest and on principal the monthly payments would be sufficient to satisfy that, are they not?

A. That would not arrive at that rate. That particular calculation in taking the balance of the loan each month and adding together making a loan for one month you get the figure of \$18,641.40, that figured on the charge of \$220 gives you the rate of 14.162. I have a pencil and work sheet.

Q. I don't think that is necessary. And, figured the same way on an interest charge deducted in advance of \$330 the rate is what?

A. The rate is the same figured the same way 21.24 per cent.

Q. In other words, I can say that the effective rate is 21.24 per cent. You mean that that is the actual rate of interest contracted to be paid on the actual money in the hands of the borrower for the period of time involved, is that correct?

A. That is on this assumption that you calculated it according to those sums if they were loaned for one month.

Q. Is that method of calculation the same or different than the method of applying all monthly payments first on principal and then on interest?

A. Yes, it is different.

(Testimony of Hugh Copper Tennent.)

Q. To what extent? I mean does it result in a higher rate or lower rate?

A. This would result in slightly lower rate.

Q. Can you state have you at my request made an examination to ascertain whether applying on monthly payments first accrued interest and then principal whether the effective rate on the loan represented by this note is 796 whether that effective rate is or is not in excess of 24 per cent a year, just answer yes, or no?

A. I have made the calculation.

Q. Can you state from your examination whether the effective rate is or is not more than 24 per cent? A. It is less than 24 per cent.

Q. The ascertainment of the effective rate is an involved mathematical problem, is it not?

A. Yes.

Q. It involves the use of complicated mathematical formula? A. Yes.

Q. But you have testified that you have made tests so that you can testify of your own knowledge that the effective rate is in effect less than 24 per cent? A. Yes.

Q. Very well. Now, as a matter of fact from an examination of these loans the repayments by the defendant were not in accordance with the contract, isn't that correct? A. They were not.

Q. There was always some delinquency as shown by the statements? A. Yes.

(Testimony of Hugh Copper Tennent.)

Q. In the setting up of the accounts was any charge ever made for such delinquency in addition to this interest contract for in advance?

A. No.

Q. And the amounts as shown unpaid balance due in Exhibits A-1 to H-1 inclusive do you not include any amount of delinquent interest on installment overdue, is that correct? A. No.

Cross-Examination

By Mr. Moore:

Q. Mr. Tennent, don't you know that with reference to this agreement for the purpose of borrowing this money that it could be repaid at any time within 30 days of the due date that is if the installments fell on the 20th if it was paid within 30 days that there was nothing ever come of it, that was the usual practice?

A. There was no such understanding.

Q. You have gone over these accounts, have you not? Haven't you gone over these accounts with reference to the delinquency? A. Yes.

Q. And haven't you found right up until the time that the borrowing ceased that rebates were paid where there was as high as a month and a half between the final payment of the note and due date of the note? A. That is correct.

Q. Wasn't that the general practice right along?

A. That was the general practice.

Q. And at the time these rebates ceased there

(Testimony of Hugh Copper Tennent.)

would be an agreement there to pay a portion or rebate 33 and a third per cent, had there not?

A. Yes.

Q. And didn't that rebate of 33 and a third per cent start about November 1937?

A. The exact date I couldn't say just now but I think that would be probably approximately correct.

Q. And didn't Mr. Carey request you to have the sum of \$1045 rebate of thirty-three and one-third per cent on the notes paid credited to his account?

A. There was as you notice this rebate of thirty-three and one-third per cent was not given on one or two notes.

Q. As a matter of fact there was several notes?

A. Yes, it was not given as between the two parties the delinquency had gotten to be very extensive several months and then the Hilo Finance & Thrift wouldn't give the rebate and of course Mr. Carey took that up with me and I came down to ask the Hilo Finance Company to give Mr. Carey those rebates.

Q. And wasn't the response to that that he would have to pay delinquent interest charged against the interest on the delinquency and then strike a balance from that?

A. The company was very reluctant to paying these rebates. I spent several days trying to arrive at some kind of a settlement on behalf of Mr. Carey and finally the company said okay and they would

(Testimony of Hugh Copper Tennent.)

pay the rebates but they expected Mr. Carey to make good some of this excessive delinquency which had now run for several months. They were willing to pay the thirty-three and one-third per cent provided he made some payment because of all this delinquency.

Q. Wasn't the amount of payment that they requested the one per cent a month on the delinquency, that is where the note was payable on the 20th of June or it was not paid until the last of July they wanted to charge one per cent on that note for that period?

A. No, the company wouldn't specify anything, they wanted a rebate as I recall it if had accumulated or were accumulated on the notes amounting to approximately \$1800 or \$2000. We checked that figure up and their request was for about \$500 and Mr. Carey considered for delinquent interest. However, the calculation was not based on anything particular.

Q. Now, Mr. Tennent, doesn't the time element, this time element coincide that when Mr. Carey ceased borrowing from the Hilo Finance & Thrift was the first time that the Hilo Finance & Thrift refused to allow his rebates? A. No.

Mr. Cades: I will object to the question. It is wholly unintelligible. (Argument) I object as to form.

The Court: He answered and said, no.

Mr. Cades: If he understands it, it is all right.

(Testimony of Hugh Copper Tennent.)

The Court: He answered and gave a negative answer.

Mr. Cades: All right.

Q. Now, as I understand your testimony, Mr. Tennent, that all of these loans that were made prior to the bringing of this suit that is during the period covered by the evidence in this case. You know that period what it is?

Mr. Cades: September 1.

Mr. Moore: No, August 31.

Mr. Cades: The date of the loan was September 1.

Mr. Moore: Very well, during that whole period of time.

The Court: What time?

Mr. Moore: From September 1 covering the whole entire period.

Mr. Cades: September 1, 1937, on.

Mr. Moore: That is right.

Q. That all of these loans no matter how you figured were in excess of one per cent per month?

A. No, they were not in excess of one per cent per month.

Q. Well, I thought you testified that the lowest figure was 14 per cent, 14.162 per cent per annum?

A. Yes, that is with interest deductible in advance if you are now saying what was the simple interest rate on the balance, that would be 14.162 per cent, on the declining balances. I have already answered that 14.162 per cent.

(Testimony of Hugh Copper Tennent.)

Q. Is that in excess of one per cent per month, one per cent a month would be 12 per cent.

A. Well, if that is the law, depends on the agreement I suppose.

Q. You say that in one of your calculations you have calculated on the basis of the actual amount received, that is you take in the case of a note of \$2330, take the \$2000? A. Yes.

Q. That you have calculated the interest at 2 per cent a month first applying the payment to interest and then the balance to principal?

A. Yes, sir.

Q. And that you say figures out to a little under 2 per cent? A. Yes.

Q. And on that calculation, Mr. Tennent, how many months does it take to wipe out the principal?

A. That calculation is based on the money going first to interest and then to principal so that the loan at 2 per cent would be wiped out shortly under 15 months.

Q. Wouldn't that be wiped out in 14 months?

A. 14 months and a fraction I think, between 14 and 15 months. Wait a minute, let me get that, yes, at 2 per cent a month and that would be wiped out in over 15 months because there would be more going to interest and less to principal, so I would have to make that correction, more going to interest at 2 per cent, it would take over 15 months to finish the entire principal on that basis.

Q. Mr. Tennent, this agreement under that you say you arranged between Mr. Carey and the plain-

(Testimony of Hugh Copper Tennent.)

tiff in this case that was it, an agreement whereby he was to borrow a large sum of money, was it not?

A. Yes, sir.

Q. And I believe you testified in another case that was to borrow \$67,000?

Mr. Cades: I object to that as to form. (Argument.)

Q. Didn't you testify in the District Court of Honolulu that this arrangement was for the purpose of borrowing \$67,000?

The Court: What was the title of the case?

Mr. Moore: The Realty Investment Company, Limited vs. Carey, or Carey vs. Realty Investment Company.

The Court: Do you recall testifying in the case?

A. Yes, I recall testifying.

Q. Well, is that correct, was the agreement to lend \$67,000 over a period of time?

A. The first agreement was to borrow about \$12,000 or \$15,000 in 12 monthly borrowings and then that loan, those were to be paid off, they were to be small borrowings. I have a budget which shows that.

The Court: You can refer to anything.

A. Yes, but along the line the borrowings were increased.

Q. I call your attention to this. Do you recall being asked in this case that I am now speaking about where you testified before the District Court of Honolulu, will you state to the court what your

(Testimony of Hugh Copper Tennent.)

duties were about arranging credit for Mr. Carey?
Do you recall being asked that question?

A. Yes.

Q. Did you answer as follows: "The first request was to prepare a financial statement of Mr. Carey's business. Mr. Carey had applied to the Discount Corporation for finances, showing that loans were made by the Discount Corporation but they loaned only apparently small amounts, as far as I can recall. They were doubtful about the account. It wasn't very long before this credit which the Discount Corporation made available was used up and Mr. Carey had a branch in Hilo and I think it was at my suggestion that he might see whether the Hilo Finance & Thrift Company would loan him some funds. At any rate Mr. Carey and I discussed it and on one of my visits to Hilo I approached the Hilo Finance & Thrift Company."

Is that right? A. That is correct.

Mr. Cades: I move that answer be stricken and I object to the question on the ground that it is wholly improper to bring in the transcript of another proceeding. (Argument.)

The Court: You can see if he is impeaching. This witness hasn't stated anything to the contrary.

Mr. Moore: He has stated that the arrangement was around \$12,000 and we want to show it was prior to his \$67,000.

A. May I explain that figure?

Mr. Cades: Just one moment. If the idea is to

(Testimony of Hugh Copper Tennent.)

impeach this witness he has a perfect right to have introduced in this cause and I make no objection that this is not a certified copy. In fact I am willing to stipulate that this whole transcript go into evidence. I think it is doing this witness injustice and also the court to take two or three questions out of there. I submit to the ruling of the court.

Mr. Moore: May it please the court, that is not the purpose of this at all. I asked him with reference to the arrangement he had made. (Page 11 and 12.) (Argument.)

The Court: I will allow the question. Do you understand the question now?

A. If you wanted \$67,000 and borrowed \$1000 a month naturally that would all add up to a large sum. The question should be asked me what was the total limited borrowings or the total amount. If you asked me how much money went through my bank account in a month it might be a large sum but my earnings would only be \$500.

Q. I asked you a question a little while ago how much the agreement was to borrow and you said \$12,000. Now, do you want to change that testimony?

Mr. Cades: Your Honor, that is an unfair statement. As I understand the evidence, the evidence was that from time to time they borrowed in monthly borrowings and the question was, what was the amount of the loan at one stage and he said, \$12,000. I submit if your Honor will examine

(Testimony of Hugh Copper Tennent.)

the transcript which he is trying to get in here in an oblique manner, you will see that the questions and answers will only show that the borrowings were \$67,000. (Argument.)

Mr. Moore: May it please the court I am willing to read this answer and if I understand English it bears out my argument.

The Court: Will you ask him that question again?

Q. The next question and answer: "The Hilo Finance & Thrift Company agreed to lend \$67,000 over a period of time against contracts which were contracted for on the Island of Hawaii." Now, did you make that statement or not?

A. It is in the transcript. I imagine that is what I said.

Q. And wasn't that the agreement?

A. The agreement was to borrow monthly certain sums. The limit of the outstanding balances was determined by the first agreement. Now, if they reached—I can't put my hand on——

Q. Well, you stated here they agreed to lend this amount, is that true or is it?

A. They agreed to lend \$1165 a month providing he put up sufficient collateral for recovery.

Q. Was there any agreement by the Hilo Finance & Thrift Company to lend \$67,000 over a period of time against contracts which were contracted on the Island of Hawaii?

A. I think that is putting a wrong connection on it. These loans went on for month after month

(Testimony of Hugh Copper Tennent.)

amounting to \$67,000. I assume—I haven't the figures before me but that looks like the right figure.

Q. Well, you certainly wouldn't state under oath, Mr. Tennent, that they agreed to loan this sum if that wasn't true?

Mr. Cades: I object, he can correct it, ask him and he can answer it.

The Court: Yes, that is right.

Q. Well, did you make this statement?

A. I assume if the statement is there.

Q. Let's read it then right there. (Giving the witness the transcript.)

A. Mr. Carey presented a budget which provided for borrowing so much every month and provided for repayment. Now, the total amount of the borrowings that appeared on the budget would not be that amount. That is he would borrow monthly that amount or approximate. That is a round figure and not that I had any figures in front of me to state. The figure may be over \$10,000 and so on. The arrangement was to borrow so much a month and to pay so much a month but when I stated here that the amount under the first arrangement was that he wouldn't be indebted to that company in any month over a certain amount which Mr. Carey had collateral put up.

Q. Now, you say, Mr. Tennent, that you have represented a number of finance companies here in the Territory as an auditor, is that correct?

A. Yes.

(Testimony of Hugh Copper Tennent.)

Q. Now, you are familiar, are you not, with the various transactions between the Hilo Finance & Thrift Company and Mr. Carey?

A. Yes.

Q. And you know, do you not that in the commencement of the borrowing from the Hilo Finance & Thrift Company that note for \$2330 was executed of which \$2000 was turned over to Mr. Carey, \$330 was retained as pre-paid interest. You know that, do you not?

A. As interest deductible in advance on \$2330.

Q. Call it what you will. And then the succeeding notes were used, were they not, first they deducted the interest in advance, second, they paid the first installment due on the first note, that is the second note.

Mr. Cades: Your Honor, please, I object to this question but I want to get something straight with counsel. There was no part of the stipulation that counsel would prove his counter-claim under the guise of cross-examination on our case in chief, When it comes to putting on the evidence as to the existing counter-claims on the notes preceding September 1, 1937, I have no objection of Mr. Tennent being called as a witness to testify anything that is pertinent but in order that this record may have some sort of order I shall object on the ground that the inquiry is not any response on the direct examination and is something they will drag out. (Argument.) I don't think that it is a fair way of presenting this case to get into the details of the matter.

(Testimony of Hugh Copper Tennent.)

Mr. Moore: May it please the court this witness has testified that he was the auditor for both; that he made arrangements and that he is familiar with the transactions from both sides. He has testified to the execution of 8 notes here which are 8 in this transaction and I submit, may it please the court, if they put him on and he testifies that he is familiar with these transactions, we can cross-examine him solely on the question of credibility as to whether or not, not taking in any other reason but solely on the credibility.

The Court: I will allow the question.

Q. And then the third note, the same deduction of interest was made and there was another deduction of two installments that is one of them due on the first note and then one due on the second note. They were applied to those two notes, is that correct?

A. That was not the universal case but that is the frequent case.

Q. And you say that is not universal. That is, there was notes was there not thereafter which the whole amount of cash was turned over to Carey?

A. Yes.

Q. That is what you mean by the exception?

A. Mr. Carey wanted additional money he asked for all the cash. On occasion when Mr. Carey had funds he paid the notes that were due.

Q. And now, Mr. Tennent, there was a period where there were fifteen of these \$2330 notes outstanding?

A. Yes.

(Testimony of Hugh Copper Tennent.)

Q. Where a new note would be executed and the entire amount of that note plus \$330 in cash which was paid by Mr. Carey to the plaintiff which were used to meet the installments due on the 15 prior notes?

A. On the level \$2330 which is usually the note after deducting interest, the balance in many cases was applied on other notes.

Q. And if there was 15 notes outstanding would payment on each note, each month was \$155.32 and 15 times that equals \$2330?

A. Yes, with a few cents difference.

Q. So that when 15 notes were outstanding and monthly installments were due, the execution of a new note of like amount because of the deduction of \$330 interest paid in advance was \$330 short of the amount needed to meet those installments?

A. Yes, in addition let me finish. There was a rebate of course due which the company remitted, there were two transactions on each one of those to the other things that you have said.

Q. But in order, in case where we are talking about the sixteenth note, you have 15 outstanding and we talk about the 16th note where the whole amount of that note is applied to the payment of installments on the 15 preceding notes, it would take \$330 in cash no matter where you got it, whether it was from rebate or actual dollars to meet the installments due on the pre-existing 15 notes?

A. Yes, sir.

(Testimony of Hugh Copper Tennent.)

Q. Mr. Tennent, did you ever figure out for the purpose of these calculations that you had with your own interest, did you ever figure out what the actual amount of cash at a given time had been received by Mr. Carey?

A. I figured those calculations every kind of way.

Q. Now, did you ever figure out that when there were 15 notes say, the first series of 15 notes of the \$2330 type, that there was about \$69,000 actual cash paid to Mr. Carey. I withdraw that and change that. Did you ever figure out, figuring on the basis that there is notes here of two kinds \$2330 and \$1165. Did you ever figure out on the amount either of the \$2330 or \$1165 if there was 15 outstanding, how much actual cash would be turned over to Carey on that amount of notes?

Mr. Cades: Your Honor, I object to the form of the question because it depends on what time he is talking about in these series and the stipulation we have agreed upon show all these facts. (Argument.)

The Court: I think we will save time. He can answer the question. If you don't understand any of these questions, you speak up.

A. This is somewhat like the other ones as to whether Mr. Carey contracted for \$67,000 or for 15. This one I couldn't possibly answer without—

Q. I am just asking you if you have ever—
Mr. Cades: Let him answer.

(Testimony of Hugh Copper Tennent.)

A. I couldn't possibly answer without the notes in front of me and the work sheets and so on. As I understand it is how much cash would be out that Mr. Carey would have.

Q. You misunderstood my question, Mr. Tennent. I am asking you if you have in your various calculations figured out how much cash would be advanced to Mr. Carey on the basis say of 15 \$1165 notes—there is two kinds here—have you ever made that calculation.

Mr. Cades: Your Honor, please, I object to the form of the question. Any response can't be responsive to that question. (Argument.)

The Court: Do you understand that question, Mr. Tennent?

A. 15 notes of \$1165 would be sixteen or seventeen thousand. As I say it is like the previous thing how much would you borrow \$67,000 or 15. He would have borrowed on 15 notes actually sixteen thousand odd. But the question is how much cash would Mr. Carey have out of that at the top figure, at the maximum figure?

Q. That is on this basis. We have gone through and I ask you questions here I go that there are times during this transaction or during this period of time covered by these transactions where there are 15 notes out? A. Yes.

Q. And Mr. Carey in the first note, say of the \$1165 type gets in cash \$1000. The next note \$165

(Testimony of Hugh Copper Tennent.)

is applied to the installment due on the first note and Mr. Carey gets the difference and then you carry that on out to 15 notes so that when you get down to the 14th or 13th note, Mr. Carey I have asked you if you have ever figured that out so that when you get down to the 13th note Mr. Carey only got about \$68. Did you ever carry that out in your calculation?

Mr. Cades: I object to that.

The Court: That is a proper cross-examination. He is an expert here.

Mr. Cades: May I have an exception?

The Court: Yes.

Q. Here we are talking about 15 notes?

A. Yes.

Q. There has been no payment in cash on any of them, not one nickel. The only applications to the installments of the notes have been by credits from the succeeding notes, that is No. 1 note there is a \$165 deducted as prepaid interest and \$1000 goes to Mr. Carey. No. 2 note \$165 is deducted as prepaid interest \$77.66 credited to the first installment of No. 1, the difference sent to Mr. Carey or given to Mr. Carey in cash. The third note there is two times \$77.66 or \$155.32 which is credited to the second installment to the first note and first installment and to the second and carry that on down through until you get the 15 notes. Have you ever figured out a place in that series of 15 where Mr. Carey gets nothing, on what note?

A. That has been figured out.

(Testimony of Hugh Copper Tennent.)

Q. And do you know or don't you know that on the 14th note in a series of that kind Mr. Carey would get nothing?

A. He would get nothing on the 15th note is that what you mean and he would get—I want to have my pad and pencil so that I can see. I know he would get very little on the thing.

Q. Maybe this will help you. (Showing witness a sheet of paper.)

Mr. Cades: If it satisfies counsel to take his time in a case like this I am perfectly happy, go ahead and read the question so that he can answer intelligibly. (Argument.)

The Court: You understand the question, Mr. Tennent?

A. Yes, I understand it.

Q. It is just simply a question of calculation. Now, you go ahead and figure it out.

A. That is right, on the 14th month you get none.

Q. I show you an adding machine tape so that you will check those figures to make sure that they are all on.

Mr. Cades: May I see it?

Mr. Moore: Yes, surely.

Mr. Cades: What is the question?

Q. He has figured out the figures here that appear, that on the first month the defendant would get \$1000, second month he would get \$922.34, the third month \$844.68, fourth month \$767.02, fifth month \$689.36, six month \$611.70, seventh month

(Testimony of Hugh Copper Tennent.)

\$534.04, 8th month \$456.38, 9th month \$378.72, tenth month \$301.06, 11th month \$223.40, twelfth month \$145.74, 13th month \$68.08 nothing the 14th or nothing the 15th.

A. Except the 15th he gets the rebate coming in.

Q. That is rebate start coming in on the first note?

Mr. Cades: We would be willing to stipulate that that is mathematically correct.

Q. All right, now if he doesn't pay these notes on their due date then he isn't entitled to the rebate, is he?

A. According to the practice done here in Hilo, which is not too strictly interpreted but under the contract he was not entitled.

Q. So that in order to get a renewal thereafter he had to pay \$165 a month, did he?

A. Each time he borrows \$1165, undoubtedly interest of \$165 is deducted and went along on that basis.

Q. By the way, Mr. Tennent, did you check the tape so that the figures on that tape I want to get that final figure as against the ones there to make sure that they are all the same figures.

A. Those are the same figures.

Q. Showing a total of the amount which would be received under a series of notes like this one would be \$6,942.52?

A. Yes, sir.

(Testimony of Hugh Copper Tennent.)

Q. Now, Mr. Tennent, did you ever figure what rate of interest \$165 was with respect to \$6,042.52 for one month?

A. There is a rebate to follow.

Q. I am saying here that if the thing is not paid on time and he isn't entitled to his rebate, what is the rate, what would be the rate of interest figuring that the amount borrowed is \$6,942.52 and the amount of interest paid for one month is \$165?

A. The amount borrowed isn't there; the amount is not there.

Q. I am just asking you what would be the rate of interest figuring that that is the amount and the amount paid for 30 days is \$165.

Mr. Cades: Before I raise my objection I would like to know whether I understand the question. The question is, what is the effective rate on \$6,942.52 principal where you pay interest equal to——

Mr. Moore: \$165 a month.

The Court: That is a mathematical question. He can answer it.

Mr. Cades: I just wanted to see what the question was.

A. There is a rebate. Do you want the rebate?

Q. No.

The Court: Forget the rebate now and just leave that out. It is simply just a mathematical question.

A. There is a faulty assumption behind the calculation.

(Testimony of Hugh Copper Tennent.)

Q. I am asking you what the interest rate is. Let me explain it out. I want the interest rate now.

A. If you actually pay \$165 a month for \$6,942.52, that is what you borrow and you pay \$165 a month for it, that would amount to 28.5 per cent. There are innumerable methods of calculation and I would like to study this over at lunch time.

Q. May I, just so that you can study another one over the noon hour and when you get back to continue, just a couple of questions on this particular line. Now, you will notice in this calculation that I showed you that commencing with the 14th month the borrower did not get anything and then there is still 15 months to go. Throwing out the question of rebate, that is, he hasn't paid them on time and he isn't entitled to it and also figure out what the rate of interest would be on the 15th month, where you have to do in the borrowing there is still more added to it, and there is nothing more given to the borrower because the prior notes eat up all he has got and he pays another \$165. See if there is any difference there on the 15th.

The Court: The court will take an adjournment until 1:30 p.m.

(After the noon recess, all parties to the proceedings being present, the following testimonies were taken:)

Q. Now, Mr. Tennent, you told us just before recess that this figure \$6,942.52 on a series of notes,

(Testimony of Hugh Copper Tennent.)

15 notes of \$1165 each that when the 14th note was executed, the defendant would get no more cash from the 14th note but would have received from the prior notes, the prior 13 notes this figure of \$6,942.52 and when he executed the next note there was deducted \$165 as prepaid interest and figuring that, taking the figure \$165 as the rate of interest for 30 days on \$6,942.52 that that would run 28.5 per cent. Now, let's go to the 15th note. On the 15th note he would not get any more cash, would he?

A. No.

Q. And there would also be prepaid interest deducted of \$165, would there not?

A. Yes.

Q. And besides that there would have the \$77.66 being paid on the last installment of the first note, would there not?

A. Yes, sir.

Q. So that in order to keep these notes in status quo he would have to put up \$242.66, would he not?

A. No.

Q. Well, he would have to put up——

Mr. Cades: You can explain anything if you want to.

Q. You would have to put up \$77.66 to pay the last installment on the first note, would you not?

A. That would be paid out on a new note. It would not come out of cash. Assuming your procedure it would be \$165 paid every month in status quo and it would go on indefinitely otherwise——

Q. Now, Mr. Tennent, I will refresh your recollection. We showed you these figures this morning and this is one showing the actual cash and

(Testimony of Hugh Copper Tennent.)

on the basis of \$1000, this is the amount which is not prepaid interest. On the 13th note the man would get \$68.08, would he not? A. Yes.

Q. And there would be \$931.92 that was credited to installments of this series that is to meet the installments and when you got to the 14th note the borrower would get nothing and it would take \$1009.58 to meet the installments due on the prior notes, would it not?

Mr. Cades: That is still a continuation of the hypothetical question?

Mr. Moore: Yes, that is true.

The Court: Yes, you may proceed.

Q. Is that correct?

A. So far as the 14th.

Q. Now, when you come to the 15th, Mr. Tennent, you have one more installment to meet then you had on the 14th? A. Yes.

Q. And we know that the installments on this sort of note are \$77.66? A. Yes.

Q. And when you get to the 15th note that installment is not only \$77.66 short to meet the prior installments but also \$9.58 more than that?

A. Yes.

Q. But forgetting the \$9.58 you have prepaid interest from your \$1165 note deducted in advance and then you haven't enough funds or realization out of this 15th note to pay the last installment on note No. 1 and that last installment on note No. 1 is \$77.66, is it not?

A. Yes, but you are adding you say premium

(Testimony of Hugh Copper Tennent.)

for one month renewed that is not a cash payment. You are on one hand you are talking about the actual cash out. Now, you are combining down there a premium which is not cash out with \$77.66 which is cash. You can't do that.

Q. All right this figure here of \$6,942.52 in a series of 15 notes is all the cash that is advanced to the borrower where the installments on the prior note are taken care of by the application or the credit of funds from the note that you borrowed, the new note as we will say?

A. Yes, that is correct.

Q. So that when we get down to the 15th note you get a situation where you haven't enough funds from the realization from the 15th note to meet the installments due on the prior note, don't you?

A. Yes.

Q. And with exception of this small figure of \$9.58, which was thrown out of the picture you have to have the amount of this last installment of the first note, do you not? A. Yes.

Q. So that in addition to the execution of the 15th note you must put up \$77.66 to keep the 15th note's current, is that correct?

A. That is correct.

Q. Now, did you ever figure out the rate of interest, taking the amount as \$6,942.52 and the amount of interest paid for one month as \$242.66?

A. No, I never have and never will.

Q. All right, you figure that out for us?

A. That would be foolish to figure it out.

(Testimony of Hugh Copper Tennent.)

The Court: Disregard the case and its application to the case and just figure it out as a mathematical question.

A. Pretty nearly 42 per cent.

Q. 42 minus then? A. 42 minus.

Q. Now, if your series of notes would continue, this would be the highest level that it would get at by paying in cash the last installment of the 15th preceding note; it would keep it at that same level, would it not?

A. There is one fallacy that I have to point out there.

Q. Will you just answer my question?

A. All right.

Q. Answer this question and any fallacy you can point out later. This has got nothing to do with the fallacy right now, this question.

A. Well, if you work at that calculation omitting the fallacy that would——

Q. All right, now Mr. Tennent, supposing we take another situation here. I think you have the note on the pad there. We found, Mr. Tennent, that Carey in a series of 15 notes received in actual cash \$6,942.52.

Mr. Cades: Now, I will object that this is the first time that Carey's name has been interjected. That is an inaccurate restatement. Make it X.

Q. All right. We will find on 15 notes that the borrower received in actual cash \$9,642.52. Now, in a series of 15 notes, of course there is 15 times \$165 deducted as prepaid interest.

A. As Interest deducted.

(Testimony of Hugh Copper Tennent.)

Q. And that of course on the 15 note there would be one installment paid, would there not? When you get 15 of them there would be one installment left on the first note when you got your last note? A. No, 15 notes, you are right.

Q. So that it would be 15 times 165 less \$77.66, 165 times 15 that is \$24.75 and the installment is \$77.66, that is rebate interest deducted less one installment would be \$2397.33. Now, then you said there was an agreement here whereby the largest rebate to be allowed was thirty-three and a third per cent? A. Yes.

Q. That would be one-third of this figure would it not of \$2,397.33?

A. One-third of the figure before you deducted something from it, one-third of all the interest that would be 24 something down there.

Q. Supposing we put this one-third of \$2475 that would be \$825, that is correct? A. Right.

Q. And that would be \$1572.33, would it not?

A. Yes, sir.

Q. Then now, Mr. Tennent, you say that the arrangement was that Mr. Carey was to pay this amount of interest on the money borrowed less the rebate. Now, we find the actual money received is \$6942.52.

Mr. Cades: Your Honor, please, counsel is testifying——

Q. Assuming that, those two figures total \$8,514.85. Now, under this agreement wasn't this all the money that, taking this hypothetical question as

(Testimony of Hugh Copper Tennent.)

put to the terms of the agreement that you have, isn't that all that was due? Wouldn't that be all that was due at the end of a series of 15 notes?

Mr. Cades: If your Honor, please, is this a hypothetical question?

Q. It is a hypothetical question that on 15 notes with this actual money received this amount of interest deducted in advance less rebate if this figure here. Say that the rate of interest for

Mr. Cades: I am not sure whether I understand the question well enough to object to the question.

A. Yes.

Q. Mr. Tennent, taking the last figure I gave you on the other side which is \$242.66, that is this figure here. Say that the rate of of interest for a month, that is not the rate but the amount of interest for one month is \$242.66, can you figure out what that rate of interest is?

A. The rate would be 34 per cent but I should say that there is a series of falacies if I could show you.

Q. Is that plus or minus? A. Plus.

The Court: Are you all through, Mr. Moore?

Mr. Moore: Yes.

The Court: Will you go ahead and explain the falacy? May I use the blackboard?

The Court: Yes, go ahead.

A. There is no question but that this was the actual cash under this hypothetical example that Mr. X would receive, and that is what had been owing let us say on the 13th month, but you have

(Testimony of Hugh Copper Tennent.)

got \$1000. That is, assume that we are talking about money. We are not talking about notes. The notes were \$1165, in following your hypothetical example down there was \$1000 and the next month X would get \$922.34, and he had \$1000 for his first month. The second month he gets \$922.34, so that is the equivalent of \$1922.34 for one month that he has had. Next month he gets \$844.68, which is the equivalent of \$2,767.02 for one month. He has had that for one month and he has had that for one month. I would say \$77.66 is coming off here all the time because \$77.66 is being applied on the notes. In the first month X gets \$1000; in the second month he gets \$922.34. So the actual money he has had in the second month is \$922.34, and he still had the thousand from the first month. So if you reduce this all to one month he would have \$1,922.34 for one month. Next month he gets \$844.68, which means that he has \$2,767.02 for this month when he has that \$1,922.34 and so on until we come to here he has the \$6,942.52, but he has had all these sums for these months that is equivalent to and of \$62,731.76 for one month. Now, up to that point the finance company hasn't had a dime. They have been paying out all the way along. They have paid out what is equivalent to \$62,731.76. We are reducing it for interest calculation, the same as you would for one month. That is equivalent to a loan of \$62,000.00 for one month. That is in 15 months these various sums have been loaned. All right, at this point with some little difference due to a few dollars as you

(Testimony of Hugh Copper Tennent.)

pointed out before the installment due, the company gets \$165. Now, in this calculation you assume that this interest should be applied to this sum for the month which would give a rate of 28.5, but what about all these sums that have been running along? We have \$62,731.36 loaned for the equivalent of one month, and on this 14th note here the first we are talking of cash here in notes, the first cash comes in which comes back to the Y, the finance company, so obviously this calculation isn't correct as it has to take notice of what has gone before. If there has been all this amount loaned in 15 months before hand and nothing has been coming in cash, the first cash that comes in has got to take into consideration all this. As a matter of fact, you cannot use that calculation because it ignores what really happened. It is true that after each month \$6,942.52 was borrowed and \$165 extra was paid and it was repaid back in bulk that month you would get a rate like 28.5. There is absolutely no, it has not any relationship to what really happened as is shown right here so that you can't apply that calculation at that point. One might ask here \$165 if this goes on every month 15, 16, 17, 18 right along and the amounts are being applied to prior notes, the company Y would be getting back \$165 a month, how are you going to apply that \$165 to principal or are you going to apply it all to interest until it catches up or are you going to apply it partly to interest and partly to principal. All those questions come in in fixing an effective rate. Now, let us come down to this calculation.

(Testimony of Hugh Copper Tennent.)

Mr. Cades: The witness refers to the calculation of the rate of interest at 42 per cent.

Mr. Moore: Indicating the one on the note 15.

Mr. Cades: Indicating on the blackboard the highest question of the note 15.

A. How can you miss. We are talking here of cash. We are not talking of premiums but we are saying that at this point the money, no more money is going to X but Y is now starting to get something back. Now, at this point how can you add a premium to a cash. We have ignored the premiums all through all the amounts deducted in advance. We have ignored them all through and now we add them in and mix it up with the cash item and say this is an amount of interest. We can't mix those two up. It is absolutely a mathematical impossibility and say that the result is interest.

Mr. Cades: Will you take the witness stand, unless you have some further explanation?

Redirect Examination

By Mr. Cades:

Q. Mr. Tennent, enlarging on this hypothetical question which has been asked you and which has been explained I would like first of all, your Honor, please, I have a copy of this calculation for which I would at least like to mark it for identification, so that it will show on the record.

The Court: It may be. I suggest that you do the same on yours, Mr. Moore.

Q. I refer now on the blackboard, to the figures on the blackboard which has been introduced and

(Testimony of Hugh Copper Tennent.)

marked as an exhibit I for identification, the first column you have the actual amount of cash that is dispersed to the hypothetical borrower, is that correct? A. That is correct.

Q. On a monthly basis?

A. That is correct.

Q. And one thousand is advanced the first month and \$922.34 the second month and \$844 the third month and so forth, is that right?

A. That is right.

Q. So that at the end of 14 months you have advanced in cash \$6942.52?

A. That is correct.

Q. Now, the hypothetical borrower has had the use of this \$1000 for how many months at the end of 13 months? A. 13 months.

Q. And he has had the use of \$922.34 for how many months at the end of 13 months?

A. 12 months.

Q. And \$844 for 11 months? A. Yes.

Q. And your figure of \$62,731.76 indicates the amount of actual dollars that he had the use of for one month? A. For one month.

Q. So that if you were to take interest at 24 per cent for one month that would in no way reflect in this hypothetical question, is that correct?

A. That is correct.

Q. Let me resort to the actual case and forget the hypothetical question. You testified that the agreement was that interest was to be deducted in advance. A tabulation shows that interest was de-

(Testimony of Hugh Copper Tennent.)

ducted in advance. Does the hypothetical question give any effect to interest deducted in advance?

A. No.

Q. Another matter, doesn't the hypothetical question as answered by you assume that there was an obligation on the part of the lender to lend the same amount each month and an obligation on the borrower to apply part of the proceeds each month to prior existing notes?

A. Yes, sir.

Q. That was assumed?

A. That was assumed.

Q. Under the contract which you have testified was there any obligation on the part of Mr. Carey to borrow or on the part of the Finance Company *this* loan each month?

A. No.

Q. In fact, did it not depend on the state of Mr. Carey's business and the state of the security offered?

A. Yes.

Q. So that at any time during this entire proceeding under the agreement which you have testified of your own knowledge was not Mr. Carey free to go to the bank and to go to any other company or get it out of his own funds if he wanted to.

A. Yes.

Q. And it was purely optional?

Mr. Moore: I object, that question is leading.

Mr. Cades: He is an expert witness and is not going to be influenced by what I have to say to him. He is under oath.

The Court: Try not to lead him.

Mr. Cades: I will do that. I am sorry.

Q. Now, as a matter of fact, in your capacity

(Testimony of Hugh Copper Tennent.)

as auditor for the plaintiff in this case haven't you had occasion from time to time to compute what the effective rate of this and the other loans were?

A. Yes.

Q. Did you make that computation once or many times? A. Many times.

Q. Have you made that computation as well for the defendant in this case? A. Yes.

Q. You have discussed with the defendant the price that he was paying for the money?

A. Yes.

Q. Will you state to the court what the computation was of the effective rate as computed by you over the course of this loan?

Mr. Moore: We object as being incompetent, irrelevant and immaterial.

The Court: I will allow the question.

Mr. Moore: Exception.

A. I should explain a little more.

The Court: Go right ahead.

A. Mr. Carey, in his borrowings from the beginning didn't understand these rates. He had an accountant and in the beginning we discussed the rates and their cost to Mr. Carey. As time went on Mr. Carey got more and more confused with these rates. Then there were frequent discussions which led to asking for increased rebates. I frequently pointed out to Mr. Carey that his borrowings from finance companies expressed in terms of cash amounted to 16 per cent or thereabouts. That used to show out on his auditing books. The 16 per

(Testimony of Hugh Copper Tennent.)

cent naturally reflected rebates and so on. It was just the figure that showed up at the end of the year. I would like to carry further out of a previous question when Mr. Moore asked me whether any rate for delinquency had been discussed. The Hilo Finance & Thrift Company had agreed to this thirty-three and a third but a time came when the repayment of the notes Mr. Carey ceased paying for two or three months and the rebate was not allowed him. This produced some friction between those two, Mr. Carey and the company. When I became aware of it—which was some time after it had occurred—I went down to see what I could do to adjust matters. The company was very reluctant to giving these rebates and for two or three days declined to do it, but finally the treasurer told me that he would grant all the rebates right up to date including the loans that were still running provided Mr. Carey made some offer on his side. The rebates amounting to roughly \$2000 at that time as far as my memory goes, and I suggested to Mr. Carey that he offer him \$500 on behalf of this delinquency which had now run to many months on notes.

Q. Are you referring to notes prior to September 1, 1937, or after? A. Mostly prior.

Q. Prior to September, 1937? A. Yes.

Q. Was any agreement arrived at with respect to the rebates between parties?

A. No, Mr. Carey conceded that he should be allowed full amount of rebates even though the final due date had long passed on these notes and that

(Testimony of Hugh Copper Tennent.)

he should not make any payment. He did later and he offered to make a small payment which was, if I recall, a hundred or a hundred and fifty dollars and he telephoned that to Hilo and it was accepted.

Q. But under the agreement as you have testified to here were those rebates repayable or not repayable under the original agreement? Were they repayable or not repayable under the terms of your original agreement?

A. They were repayable under the terms of the original agreement providing the payments were kept up to date.

Q. And they had not been? A. No.

Q. Therefore were they not repayable?

A. Yes.

Q. And what you did was to act as a delegate and get an adjustment on the agreement?

A. I was trying to get these two people satisfied. They were both friends of mine and I was trying to get them satisfied.

Q. But no agreement resulted from your efforts?

A. No agreement resulted from my efforts.

Q. Referring to the notes from September 1, 1937, on and omitting any reference to the rebate I am asking you whether you have computed what the interest would be if the maximum of two per cent per month were charged computed on the declining balances?

The Court: You are just referring to the notes that are the subject matter of this suit?

(Testimony of Hugh Copper Tennent.)

Mr. Cades: Yes. A. Yes, I have.

Mr. Moore: On this point I presume that my continuing objection goes on.

The Court: Yes, sure.

A. (Witness at blackboard): Take this calculation I am making a note of \$1165 because \$1000 is very easy to follow it. Everything is doubled up for \$2330. It is the same thing only doubled up.

(A recess of five minutes was had, after which time all parties to the proceedings being present, the following testimonies were taken:)

Mr. Cades: Your Honor, please, the witness is demonstrating the effective rate in connection with a note on which \$165 is deducted in advance on \$1165 note and I should like to have his calculations which are on the blackboard and they have been reduced to this exhibit marked for identification.

The Court: That may be marked the next letter in order.

Q. The witness is now referring to Exhibit J for identification. Go ahead.

A. This calculation is no different from the ordinary bank figuring on a loan. If one borrows \$1000 from the bank and paid so much every month, the bank deducts some interest and applies the rest to principal. The interest deducted determined by the rate. This is hypothetical but does show the highest rate that can be considered under any method of calculation to apply to this type of transaction. If, for instance we applied this \$77.67 to \$1165, that

(Testimony of Hugh Copper Tennent.)

being the note, we would get a different result. We would get a lower rate because of the bigger principal amount. However, this one we have come down to see if we take the thousand dollars, just what the interest is. Now, I have taken two per cent a month because two per cent a month would bet twenty-four per cent per annum. The first payment on this 1165 note being of which 1000 the borrowed had in cash first repayment is \$77.67. The interest at two per cent a month would on that thousand would be \$20. One per cent would be 10; two per cent would be 20. So we take the 20 for interest and apply \$57.67 to principal and it gives \$3942.33. Next month a similar payment, the interest at one per cent per month would be 9.42 but double that up and we get \$18.85, that is just twice this sum with a cent added. The third month \$77.67, the interest is now applied on this remaining principal which at two per cent month gives \$317.67, leaving 60 would be deducted and we go down to \$823.51, same next month interest two per cent \$16.47 two times that figure, leave 61.20 to come off principal. Fifth payment same thing two per cent of this sixth payment same thing. Now, this goes right down to the 15th payment. On the 15th payment at 2 per cent the last amount you go to interest would be 1.57 77.67, would go to principal. This total repayments make it \$1165, the last payment being five cents less. In your calculation you use \$77.67 and I used \$77.67 but since we are one way one time but the last you are one in the other.

(Testimony of Hugh Copper Tennent.)

I am just drawing attention to that. Anyway 1165 is paid back as provided by the note. The interest at two per cent is amounted to \$167.74, if you use and base it on 1000 cash with a showing that this debtor if he borrowed this way still owed \$2.74. In other words he had \$2.74 more to pay and he had paid \$167.74 interest, which is \$2.74 more than was actually paid than the \$2.74 more than the 165 up here, showing that that rate must be below two per cent a month. There is a calculation that gives you the exact rate but this is so easy to demonstrate that it is used because you can see the application of the two per cent.

Q. Mr. Tennent, you have demonstrated that in this loan the amount charged in this hypothetical loan is less than two per cent a month. Now, were you familiar with the bank examiner of the Territorial office in charge of the administration of the Loan Company Act, is that correct?

A. Yes.

Q. In your professional capacity as auditor, have you had occasion to discuss the computation of interest with the bank examiner?

A. Very frequently.

Q. The bank examiner in fact is charged with the duty of examining the books and records of the finance companies to see if they comply with the law?

A. Yes.

Q. And has he discussed frequent rates with you?

A. Yes, frequently.

Q. Will you state to the court whether the

(Testimony of Hugh Copper Tennent.)

method of computing interest in the case at bar was or was not in accord with the manner prescribed by the bank examiner?

Mr. Moore: Objection, it is incompetent, irrelevant and immaterial and for the reason that if the bank examiner agrees to certain rate of interest, which is usurious under the law what the bank examiner says as to what is proper, is immaterial. This court isn't bound by what the bank examiner finds or what the examiner thinks.

Mr. Cades: (Argument.)

The Court: I will allow the question.

Mr. Moore: Exception and any other questions along this same line, continuing objection and exception.

The Court: You may have it. Will you answer the question first and then explain it.

A. Yes.

Q. Do you want to explain your answer. You seem to be worried?

A. Delay was due to the fact that the bank examiner did not officially explain his rates until 1939 so far as putting out any publication when he required all finance companies under the then act to display on their counter what was called the effective rate.

Q. I see my question was very misleading. The witness has in mind effective rate. My question was not directed to the effective rate. I merely was asking you whether the method of making, just leaving aside any question of whether effective rate was

(Testimony of Hugh Copper Tennent.)

ruled out, whether you know of your own knowledge whether this method was in accord with the method prescribed by the bank examiner?

A. Yes.

Q. The required effective rate did not appear until 1939 in the law? A. That is right.

Q. My question was not in with the effective rate. What was the maximum that could have been charged on a loan of 2330, repayable in 15 installments as in the note of September 1, 1937?

A. The amount that could be charged was one per cent a month.

Q. Computed on what amount?

A. On the 2330.

Q. Multiplied by the number of installments?

A. By the number of months, 15 months.

Q. So that the total amount that might have been deducted in advance under his regulation was——

A. I've had it in evidence before. 2330 multiplied by 15 is \$349.50 and on 1165 it would have been 174, if we get down to this example \$174.75.

Q. And the administration of the act by the bank examiner, can you state from your own knowledge whether that was consistent from time to time, it went on the books? A. Yes.

Mr. Moore: We object to that.

The Court: He has answered it.

Mr. Cades: I will bring that in by deposition. I have only one other matter that I want to clear up.

Q. You have pointed out that the hypothetical

(Testimony of Hugh Cooper Tennent.)

question that was put to you on cross-examination about the amount of cash \$6942.52 that is given by the hypothetical borrower and deliberates over 13 months, you have pointed out why that has no application to a loan where interest is deducted in advance. Is there any other way in which that hypothetical question is inapplicable to that contract which you have testified to?

A. The rebates are not taken into consideration.

Q. In a hypothetical case no consideration was given to rebate? A. Yes.

Q. Now, if in the hypothetical case you had to consider the deduction of interest in advance, how would the calculation, what method of calculation would have to be adopted in order to discover true interest?

A. You would have to use this same calculation only basing it on the 1165 and deducting the rebate, a far much lower rate.

Q. In other words, to get true interest where you are permitted to take and you do take interest in advance that is the method that has to be used in order to illustrate true interest as you demonstrate in I? A. As applied on the note.

Recross-Examination

By Mr. Moore:

Q. Mr. Tennent, as I understand it you testified on the explanation of the use of this \$6942.52 being actual cash in this received by the borrower in this

(Testimony of Hugh Cooper Tennent.)

hypothetical question, that in each month you had more, the difference between the note and the cash received to find the total amount of money used for one month? A. Yes.

Q. All right, so when you get down to the bottom here, do you want, taking this \$62,731.76, you say that this represents the amount of money used for one month, is that true?

A. It is equivalent to that amount of money used for one month.

Q. Now, you take this hypothetical question, we have that amount of money used for one month, we have prepaid interest of 15 times 165 which is \$2475. Now, will you figure out for us the rate of interest?

A. Wait a minute. It is not 15. We have only 13 examples there.

Q. Well, make it 13 then. Let's see, you've got 13. All right, take 13 times 165 is \$2145, what is the rate of interest there?

A. I could work that out, but I want to say that these sums would run on for a long while and there are no more loans so that the calculation would not get you anywhere.

Q. But you say this is for one month. Suppose it is 13 months prepaid interest of 165, that is the amount of interest prepaid interest that you have actually paid for \$2145. Now, I want to know, using this as the rate of interest, what the rate of interest is on that figure? It is 41 per cent plus, is it not? A. Yes.

(Testimony of Hugh Cooper Tennent.)

Q. Divide that by 12 and you get 3 something, do you not?

A. That would give you 41 per cent plus.

Q. And that is about almost three and a half per cent a month?

A. Yes, but I must take you back to my previous statement that you have 2145 is what you have obligated yourself to pay interest but you haven't paid the money back yet. According to the agreement you would have to have another scale of figures, and assuming that he did not pay anything and if he paid installments every month you would get 62,000, you would get double, you would get 125,000 for one month if you remember and those figures would cut your rate down to 20 per cent.

Q. That is another fallacy?

A. That is a fallacy.

Mr. Moore: That is all.

The Court: Any further questions?

Mr. Cades: No.

Mr. Moore: Your Honor, may we have a recess here to check this over?

The Court: All right, the court will take a recess.

(After a brief recess, all parties to the proceedings being present, the following testimonies were taken:)

Mr. Cades: For the purpose of the record we have rested on our case in chief, your Honor.

GEORGE B. CAREY

a witness for the defense, who, being first duly sworn, testified as follows:

Direct Examination

By Mr. Moore:

Q. Your name, please?

A. George B. Carey.

Q. Your business?

A. Sewing machine dealer.

Q. Have you ever had any business dealings with the Hilo Finance & Thrift Company, Limited?

A. Yes, sir.

Q. And those commenced approximately April 1934?

A. Yes.

Q. And as a result of that did you make, execute and deliver a number of promissory notes?

A. Yes, I did.

Mr. Cades: Upon the testimony of the counter-claim subject, in accordance with a stipulation with a motion to strike depending upon the disposition of the demurrer.

Mr. Moore: Yes.

Q. I show you here several documents and ask you if these are the promissory notes that you have signed?

A. Yes, sir.

Q. Will you check through there and see if those were all dated in 1934?

A. Yes, sir.

Q. There are how many of them, Mr. Carey?

A. Nine.

Mr. Moore: We will offer these in evidence, may it please the Court, and ask them to be marked Exhibits 1 to 9 inclusive.

(Testimony of George B. Carey.)

The Court: They may be received and marked.

Q. Now, I show you some other notes here and I will ask you to check and see if you have signed those notes and if they are dated in the year 1935?

A. Yes, there are 8, 1935.

Mr. Moore: May it please the court, we offer these in evidence as Exhibit 10 to 17 inclusive.

The Court: It may be received as the defendant's exhibits next in order.

Q. I will show you another set of notes and ask you whether or not you have signed those and whether those are all dated in 1936, and give me the number? A. 12 notes.

Mr. Moore: We will offer these in evidence, may it please the Court, and ask that they be marked 18 to 29.

The Court: They may be received and marked defendant's exhibits next in order.

Q. I will show you another set of notes and ask you if you have signed those notes and if they are all in the year 1937, and give me the amount or number of notes there? A. Yes, five.

Mr. Moore: We will offer these in evidence, may it please the Court, and ask that they may be marked next in order.

The Court: They may be so received. (30 to 34.)

Mr. Moore: At this time I have already advised counsel that there are 4 notes missing between the last note introduced by the defendant and the first note introduced by the plaintiff. The first is dated May 28, 1937, and is numbered 491 and is in the

(Testimony of George B. Carey.)

sum of \$2330; the next is on June 29, 1937, numbered 614, in the sum of \$2330; next is dated August 1, 1937, and is numbered 702 and is in the sum of \$1165; the fourth being dated July 30, 1937, numbered 712 and being in the sum of \$2330.

The Court: Those notes are they similar notes?

Mr. Moore: They are similar notes, your Honor.

The Court: Have they been paid?

Mr. Moore: Yes.

The Court: And is that so, Mr. Cades?

Mr. Cades: Yes, subject to the agreement. We had at the beginning, we stipulated with counsel that these were in existence and were paid and the detail concerning payments will be submitted in the same form with the details of the notes in chief.

Mr. Moore: With these notes coming in we ask that be marked 1-A and 2-A and there will be four which we will only have a set, your Honor.

Q. Now, Mr. Carey, when you executed and had outstanding 15 notes and you executed a sixteenth, what was the purpose of the execution of that note where you got no further funds?

Mr. Cades: I object. That is supported by nothing. Let's talk about the notes in the case now.

(Argument.)

The Court: I think it is a little indefinite. You can ask him about the agreement. You can go into that and develop it with reference to the 15 notes.

Q. Mr. Carey, will you give us what this agreement was, with reference to these borrowings?

(Testimony of George B. Carey.)

A. You mean by that that you want me to go back to the very beginning?

Q. And come forward.

A. Similar to what Mr. Tennent has testified to or do you want me to start in just on——

Q. What your agreement was and how you corrected this thing out during its existence?

A. Well, the notes were made up in our office in the amount of either \$1165 or \$2330.

The Court: Mr. Carey, are these the notes that are in evidence here; are these the notes you are talking about? A. Yes.

The Court: That is what we want to know about. Just confine yourself to these notes.

Q. These are the notes? A. Yes.

Q. And, Mr. Carey, when there were 15 notes outstanding, what did you get the 16th note for?

The Court: Just a moment, Mr. Moore, I would like this to be cleared up a little bit before you get to the 15th and 16th. You haven't shown yet how many notes they had executed on this particular day. Maybe he only executed half of these or find out from him, did he execute all these notes at this one time, that is what I want to find out.

Q. Very well. In the execution of these notes here, were these executed at one same time or different times? A. Monthly.

Q. That was the usual thing, one note each month? A. One note each month.

Q. When you executed a note each month, the first note you got a certain amount of money?

A. Yes, I did.

(Testimony of George B. Carey.)

Q. And that is the first note you got there?

A. Well, if the note——

Q. Say, the note is \$1000?

Mr. Cades: I object, your Honor, the first note you are introducing in evidence, what note are you talking about? I insist that you be definite. I don't think that this is right taking the notes. The notes are here and you can ask him, what did you do with the notes. (Argument)

Mr. Moore: (Argument) May it please the court, if there is going to be an objection of this thing at this time I would suggest that we get all the applications in and then we can ask the questions, if that is what they want.

Mr. Cades: It is all right with me. The facts are not in dispute. Your Honor already has a form worked out by both counsel for the convenience of both parties and court. A similar situation will be stipulated to show what has happened to every single note that was introduced in evidence. (Argument)

Mr. Moore: I can go on and take up another phase, your Honor.

Q. Mr. Carey, taking these notes that you have already testified to, three, four, 5, 6 and 7, were portions of those notes applied to payments on prior notes? A. Yes.

Q. Now, in addition to the application of the first amount of these notes to payment on pre-existing notes, did you pay any cash? A. Yes.

(Testimony of George B. Carey.)

Q. Have you a tabulation of that cash paid?

A. Yes.

Q. Is it there? A. Yes.

Q. Is this taken from the records of your business? A. Yes, sir.

Q. Will you let me have that tabulation and is that by year? A. Yes, by year.

Q. Will you give us the dates and amounts of those, Mr. Carey, or if counsel wishes to save time and I will take it and tabulate that and put it in.

Mr. Cades: Your Honor, please, the exhibit that has been shown to me includes a lot of payments, some on notes that are not involved in this litigation and on which we have already stipulated that payments have been made. I don't see how it would be possible to have testimony come in in view of the stipulation that counsel has made that they will affirmatively show and put in a concrete form of all payments that have been made. (Argument)

The Court: It is about 3 or 4 months. Suppose you gentlemen——

Mr. Moore: Here is the situation. May it please the court, this stipulation covers all, that is the sizes of the payments on each note. Now, those payments are made up, your Honor, of two things, one, the proceeds of notes and, two, the actual payment of cash, and of course it is certainly proper in this case to show that a portion of these paid notes were made up by applications of proceeds of further notes and others by cash. So that when we get down to the final solution now he talks about three other

(Testimony of George B. Carey.)

notes, what we intend to do with that, that any cash that he has sent forward that has applied from the three notes that we have been talking about in this case, which are not before the court, that that amount that was applied to those three notes will be deducted. So that we have a perfect picture of two things, which I am certain this court will want to know, first the application of funds from the notes and the application of funds from cash.

Mr. Cades: Your honor, please, I think I can straighten this up so simply. In order to make up a counterclaim, counsel has to show two things, first, is the payment of notes that are in service and second, the amounts that have been paid as a result of criminal usury. There can be no purpose served to come in on a series of notes and try to get in cash payments some of which cash counsel will concede were paid on notes that are not involved in this litigation, and try to jumble these up with the application of payments from other notes. If counsel wants to show what payments have been made on these notes, if he now wants to take those statements and segregate and have Mr. Carey show here cash payments and those on the application of cash received from notes, why there can be no objection on that. (Argument) I object to it because it has no bearing and is irrelevant and immaterial. I will go over this matter with counsel and if it can be made a part of our stipulation, why that can be done.

(Testimony of George B. Carey.)

The Court: It is 4 o'clock and I think you had better get together and if these facts are not disputed and if you can't, I will permit you to go ahead with your case.

Mr. Moore: Is your Honor going to adjourn?

The Court: Yes, we will take an adjournment until tomorrow morning at 9:30. Is that time enough?

Mr. Moore: Yes.

On the 25th of June, 1943, all parties to the proceedings being present, the following testimonies were taken:

The Court: Let the record show both counsel for the plaintiff and defendant are present. Mr. Moore, would you mind making a statement of your defense; you stipulated a lot of facts, you and counsel and I would like to know what your defense is here so that I can follow the evidence?

Mr. Moore: May it please the court, I think that with reference to going through the ramification I think we had better connect it up on a memorandum right straight through.

Mr. Cades: Your Honor, I don't think counsel has to go into any ramification. I meant laws to find out what the defense is. If they could make a statement as to what they are trying to prove. It is not clear yet what they are relying on as a line of defense.

Q. Now, Mr. Carey, prior to 1933 you were in the sewing machine business over in Honolulu?

A. Yes, sir.

(Testimony of George B. Carey.)

Q. And when was it that you opened a branch in Hilo? A. In November or December, 1933.

Q. Now, Mr. Carey, when you started your branch here in Hilo did you have finances sufficient to operate that business?

A. No, not satisfactory.

Q. Now, did you make any arrangements for obtaining finances to operate this business?

A. Well, I did through Mr. Tennent.

Q. And who did you make that arrangement with; what did you make the arrangement, with what form that is the plaintiff in this case?

A. Yes, sir.

Q. And what was the agreement with reference to financing this branch here in Hilo?

Mr. Cades: Your Honor, please, I will have to object. Whatever arrangements he made were through Mr. Tennent.

The Court: Well, Mr. Tennent was his agent. I will allow the question.

A. The arrangement was that it was necessary for me to put up sewing machine contracts as collateral security in a ratio of \$2.50 worth of contracts for each \$1 borrowed, and as the sewing machine contracts were paid off to me in the form of collections or if any of them were repossessed, it was necessary for me to supply the Hilo Finance & Thrift Company with additional contracts so that the collateral was kept on a par at all times on that ratio of two and a half.

(Testimony of George B. Carey.)

Q. In addition to this security was there any other security put up?

A. Yes, there was a life insurance policy.

Q. Policy on whose life? A. On mine.

Q. In what amount? A. \$10,000.

Q. Now, in borrowing money to finance this branch what amount if any were you to borrow, what total?

A. Well, there was no limit to it. In other words, it was understood that these loans would be made to me each month as long as I was in a position to supply contracts.

Q. That is collateral? A. Collateral.

Q. As you made a loan each month what did you do in addition to what you have already told us to evidence this loan. Was there any agreement or any writing or anything given?

A. Yes, there was notes signed each time I would make a loan. It would be necessary to send over a batch of contracts of matched contracts to go with the signed notes.

Q. Are these the notes that you have identified here the ones that were introduced by the plaintiff, are these the notes of which you speak?

A. They are.

Q. Now, would the loan of one or two thousand or small amounts of that do you any good in this situation? A. Certainly not.

Mr. Cades: I object. I move to strike the answer for the purpose of making my objection. He has testified with reference to the arrangement.

(Testimony of George B. Carey.)

That is wholly immaterial in the trial of this case.

The Court: I don't think that is right, Mr. Moore.

Mr. Moore: May I be heard on this situation?

The Court: Yes, sure.

Mr. Moore: May it please the court, here is the situation. We have and we say this question is very competent and material for the reason that he had a branch of sewing machine selling agency and of course we need money to support that and not just a little money but lot of money. In other words, we are trying to show that this is a borrowing agreement to operate a sewing machine agency and it is material here as to what amount or amounts we need. That is to show that just a drop in the bucket would not do us any good at all, which would further this oral agreement to borrowing a limited amount of money to operate a branch of the sewing machine agency.

The Court: He testified didn't he, he said as long as he produced collateral, it would not make any difference with these contracts, he would get the amount of money in proportion to the amount he put up as collateral.

Mr. Moore: (Argument.)

The Court: Nobody is contending that as yet.

Mr. Moore: May we have an exception to your Honor's ruling?

The Court: I will allow the question although I am frank to say that I am not too sure.

Mr. Cades: I will take no exception but I do

(Testimony of George B. Carey.)

say in order to have a record the witness should testify what was said and what was done and not his mental intention to bring in collateral matters, it would keep us here a week.

The Court: Go ahead.

Q. Now, after this agreement got in operation, Mr. Carey to begin with where were these notes drawn up, that is Honolulu or Hilo?

A. At Hilo.

Q. And later on?

A. They were drawn up in our office.

Q. Where did you get the forms?

A. They were sent to us in pads probably 50 or a hundred notes to a pad sent to us by the Hilo Finance & Thrift Company.

Q. And these notes were they the ones that are yellow, those are the ones that were sent to you?

A. Yes, sir.

Q. When you executed the note you have testified that you executed the note and then you sent along with it a collateral? A. Yes, sir.

Q. I will show you some folder here and ask you what this is. Can you tell me what this is, Mr. Carey?

Mr. Cades: Just a moment, I would like to see it.

A. This is a list of the names and style number and serial number of the sewing machine contracts that were pledged to the Hilo Finance & Thrift Company.

Mr. Cades: May the record show that the witness

(Testimony of George B. Carey.)

is referring to a list headed Contract, Hilo Finance & Thrift Company, No. 1674, \$2330. That is what is marked on the top.

Q. Now, is there a letter of transmittal attached to each one of those? A. Yes, sir.

Q. Now, Mr. Carey, was a similar one on notes of the nature that are now in evidence transmitted with that note?

A. Yes. I might add that there were times however when it was necessary to send over collateral where there was no loans made in order to offset repossessions and sewing machine contracts that had paid off thereby lowering the amount of collateral. It would then be necessary to send over a list like this minus a note.

Q. This is to bring up the ratio of your collateral to two and a half per one dollar borrowed?

A. Yes, that is right.

Q. Mr. Carey, will you just take one of those out. It is no use to introduce all of it in evidence. One of those with a letter of transmittal. Now, Mr. Carey, this list and this letter of transmittal this is a copy of the letter that you sent and the list of the contracts you sent? A. That is right.

Q. Now, the actual contracts listed on here what happened to those?

A. Why, they were paid by the Hilo Finance & Thrift Company.

Q. What I am getting at is this, were the actual contracts themselves transmitted with this letter and this list? A. That is right, they were.

(Testimony of George B. Carey.)

Mr. Moore: We will offer this in evidence.

The Court: It may be received in evidence and marked next exhibit in order.

Mr. Cades: Your Honor, have you worked on the admission?

The Court: Yes, I let it go in.

Mr. Moore: May it please the court we have here similar compilations as are attached to the plaintiff's exhibit that is with reference to the number and date and amount of loan. We will ask that these be admitted in evidence and be marked as A-1, B, subject however to checking as to the accuracy of the figures.

Mr. Cades: I think the record, your Honor, should show as my understanding with counsel in fairness to him, that subject to the objection of law, subject to the motion to strike that it was stipulated and agreed between counsel with the respective parties that the facts as shown on each of these slips now offered are facts with respect to the matter indicated therein, namely, the date of the note, the total loan, the interest, cash received, et cetera. Is that the stipulation?

Mr. Moore: Yes.

The Court: It may be received in evidence and marked next in order.

Mr. Moore: Those will have to go as A-1, 2-A, 3-A, and attached to the note.

Q. Now, Mr. Carey, you had correspondence did you not from time to time with the Hilo Finance & Thrift Company? A. Yes, sir.

(Testimony of George B. Carey.)

Q. As to what these notes that you executed and forwarded to the Hilo Finance & Thrift Company were for? A. Yes.

A five-minute recess was had, after which time all parties to the proceedings being present, the following testimonies were taken:

Mr. Moore: May it please the court, it has been stipulated that the payments in cash as listed upon this sheet would be testified to by proper witnesses. So in order to save going down through, we will put these cash payments and these cash payments. It is strictly understood our payments are in duplication as recorded on each of those exhibits attached to each note.

Mr. Cades: And one other thing, it was also a part of the stipulation, whereas the sheet shows the payments made by check on a certain date.

Mr. Murray: That is correct, this is just a date of the check and it may have been received days or a variation of days later, that is understood.

Mr. Cades: Let's get the record clear. May I state the stipulation so we won't have any dispute about it. The purpose of dispensing of the necessity of the introduction of books and records, it is stipulated between counsel that payments were made in cash by the defendant in the amounts covering the period as shown on the sheet which will be introduced; that the checks issued bore the date as shown in the sheet but that the actual payment was not received in Hilo until the time that is shown on the respective payment dates and the slips that have been

(Testimony of George B. Carey.)

introduced as part of the stipulation, and it is further agreed that these payments in cash do not constitute a duplication of payment. It is merely put in by counsel for the defendant's insistence in order to separate what payments were made out of profits, and what payments were paid out of proceeds from other sources belonging to the defendant, Carey. With that understanding this may be put in.

Mr. Moore: That is all right.

Mr. Moore: Counsel has agreed to the alteration at the bottom and if your Honor will initial it.

Mr. Cades: It is understood that we have reserved the right of cross-examination as to that.

The Court: Yes. It may be received in evidence and marked the next defendant's Exhibit number in order.

Clerk: 36.

Q. Now, Mr. Carey, I show you defendant's exhibit 11, being note dated February 19, 1935, in the sum of \$2330. Now, you will notice, Mr. Carey, that the next note is dated June 12, is it not?

A. Yes, sir.

Q. There is no new notes in between February, 1935, and June, 1935. Now, Mr. Carey—what would be this exhibit number that we have just put in?

Clerk: 36.

Q. I will show you defendant's Exhibit 36, and you will notice there, Mr. Carey, that between the time set out in exhibit No. 11 being the note of February 19, 1935, and Exhibit 12 which is June 12, 1935, that there are five payments made or six

(Testimony of George B. Carey.)

payments made between those notes and cash that is \$1000, 1019, 1397, 543, and 1000 and 863.94.

The Court: There is another one in December.

Mr. Moore: I am only talking about the ones between those dates, your Honor.

Q. Now, can you explain, Mr. Carey, why there were no new notes given between February and June and in addition why these payments were made?

Mr. Cades: We object to form, competency and relevancy.

The Court: I will allow the question, save trouble and save a lot of time.

Mr. Cades: Exception.

A. It was due to the fact that a good many of our salesmen that were working in Hilo at the time had returned to Honolulu and we did not have sewing machine contracts that were made on the Island of Hawaii to pledge with the Hilo Finance & Thrift Company for any additional borrowings.

Q. And what was the agreement at that particular time with reference to what kind of contracts had to be pledged with the Hilo Finance & Thrift Company?

A. They insisted upon having sewing machine contracts that were on the Island of Hawaii.

Q. And had you thus sent to Hilo any contracts that were not on the Island of Hawaii to secure further borrowings? A. Yes.

Q. And was there any request made of you with reference to the contracts from other islands covering the security here? A. Yes, sir.

(Testimony of George B. Carey.)

Mr. Cades: May it be understood my objection runs along this line?

The Court: Yes, that is understood.

Q. Did you ever receive any instructions with reference to this? A. Yes, sir.

Q. And from whom did you receive them?

A. Both from the Hilo Finance & Thrift Company and Mr. Tennent.

Q. I show you a letter dated December 26, 1935, addressed to you, Mr. Carey, and signed by Mr. E. C. Tennent. Is that the instruction that you received from Mr. Tennent? A. Yes.

Mr. Moore: Now, we will offer this in evidence, may it please the court.

Mr. Cades: Your Honor, please, there is nothing in this that has any allowance so far as our theory is. It is consistent with the theory of the case but if you are going to put every correspondent and everything in we will be here forever. I will object that it is wholly immaterial. If it goes in, it will be necessary for me to show everything in respect to the collateral and it can be no part of the issues in this case.

The Court: How is the collateral affecting your case?

Mr. Moore: May it please the court, as shown here between these notes there is a hiatus of about four months, that is from February to June. The agreement we rely on is an agreement to borrow money as is needed and we have borrowings shown by these notes practically every month and in some

(Testimony of George B. Carey.)

months more than once a month, and we want to show why the practice in this particular chain. In other words, the reason why the notes, the borrowings were not continued from month to month under the original agreement was because they could not furnish the security or the kind of security that the Hilo Finance & Thrift Company requested.

Mr. Cades: (Argument.)

The Court: They couldn't get any money unless they had a contract.

Mr. Cades: (Argument) Are we to go over Mr. Carey's business for the last five years and see why he didn't borrow more or less?

Mr. Moore: And furthermore, this letter contains the demand to pay over the then existing obligations and these payments——

The Court: I will allow it and it may be received and marked defendant's exhibit next in order.

Mr. Cades: Exception.

Q. I will show you a letter dated September 5, 1936, and ask you if you received that letter?

A. Yes.

Q. And that is a letter from whom?

A. Hilo Finance & Thrift Company.

Q. And dated when?

A. September 5, 1936.

Mr. Moore: May it please the court, at this time we will offer this letter in evidence, it being a letter addressed to the White Sewing Machine Agency by the Hilo Finance & Thrift Company prior to the due date of the next installments due on these notes giv-

(Testimony of George B. Carey.)

ing an accounting of what will be due and what will have to be forwarded in order to have these notes current.

Mr. Cades: Object to it for the same reason as stated. Obviously part of a series of correspondence. While it does not do any harm itself, it opens up a lot of issues in this case; how it has any bearing on it, I am not able to see.

The Court: It is stipulated here that the White Sewing Machine Agency is Mr. Carey?

Mr. Moore: That is what he testified, that he operated it.

Mr. Cades: He has not as yet.

Mr. Moore: Very well.

Q. Do you operate the White Sewing Machine Agency? A. Yes.

The Court: It may be received in evidence and marked defendant's exhibit next in order.

Clerk: 38.

Mr. Cades: Exception.

Q. Now, Mr. Carey, I show you defendant's exhibit 27, which is a note dated, that is the typewritten date that you evidently put on in Honolulu is September 29, 1936. The stamped date evidently put on by the Hilo office is September 30, 1936.

Mr. Cades: That is the date of the loan as shown on the slip.

Q. September 30, 1936. Now, you will not that on the payment of cash, Mr. Carey, on the date that you have dated the note that is September 29, you paid \$330.80? A. Yes, sir.

(Testimony of George B. Carey.)

Q. Did you receive any cash from that note?

Mr. Cades: Your Honor, please, all of those matters are matters of stipulation. Every note for the purpose of saving time if you will look at the—

Mr. Moore: In order to save time we can take care of this with reference to the notes commencing where I am, that is September 29 or 30 as appears in the Hilo records from then on with the exception of the note dated April 16, 1937, the note dated August 1, 1937, and the note dated November 30, 1937, the date received, no money in cash be paid, sent money along with the note.

Mr. Cades: Your Honor, please, I don't know whether counsel wants a double stipulation for some series. My objection is that he is taking up in piece what we have in here. (Argument.) It may be that that stipulation should be withdrawn. He has it in the matter of a stipulation and now he wants an oral stipulation. All right, you ask the questions and I will enter my objections.

Q. Did you receive any cash? A. No.

The Court: I will allow the question.

Q. What was the \$330 for?

The Court: The money that he sent?

Mr. Moore: Yes, your Honor.

Mr. Cades: I object to that again. We have already stipulated what payments he has made. There is already evidence that there was notes, there was a stipulation of how the proceeds were applied of each loan.

The Court: I am absolutely in the dark. You gentlemen have been in this case for months and

(Testimony of George B. Carey.)

you have been stipulating back and forth and I am up here trying to get in the record, trying to do something after you get all through.

Mr. Cades: Your Honor is very patient but sometimes when you try to stipulate to save time, sometimes it doesn't save time. But counsel insists on putting in past mail on this and that note. If he has anything to stipulate or bring in on anything I have no objection but it is just confusing.

The Court: Mr. Moore, is this in the stipulation?

Mr. Moore: This particular phase is not in the stipulation. Now, let me explain the purpose of this, your Honor.

The Court: If it isn't in the stipulation, I will let you proceed, Mr. Moore.

Q. Do you recall what this 330 that accompanied this 2330 note at that time was for? A. Yes.

Q. What was it for?

A. It was to pay installment payments on a previous note.

Q. What was your prepaid interest on a \$2000 note? A. \$330.

Q. And when there were 15 notes outstanding and you signed a new note received no cash, how much money were you required to send to keep your account current?

Mr. Cades: Your Honor, please, if that isn't a hypothetical question, I never heard one. He hasn't qualified this witness as an expert.

(Argument.)

(Testimony of George B. Carey.)

The Court: Is there anything in the evidence that was said about an agreement of 15 notes, Mr. Moore?

Mr. Moore: There is evidence in here not only 15, there is some 40 odd.

The Court: I mean about the particular 15 notes?

Mr. Moore: There are in these series.

The Court: There are a number of notes I know. I mean was there a special agreement about the number of notes?

Mr. Moore: May it please the Court, the purpose of this question is this: That we know from the stipulation that when these notes were made, that the proceeds were applied to the installments due on prior notes. That is reflected in each one of these stipulations, that is each one of the notes you can see that the time of the note was executed and there was a corresponding credit to each of prior notes. Now, when you get down to 15 of those, there wasn't sufficient money to pay the notes and to pay the prepaid interest. We know that the prepaid interest on each \$2300 note was \$330. Now, what I am asking this witness is, is this \$330 that accompanied these notes, it appearing in the evidence that there is that many notes, prior notes outstanding, is this \$330 for the prepaid interest or it is for something else?

Mr. Cades: We object. If your Honor will look at defendant's Exhibit 1-A on, these are stipulated facts that on April 10, 1934, that is the first note

(Testimony of George B. Carey.)

which is subject of the counter-claim, the defendant received \$1611 cash and \$310 was paid to an entirely different organization. As far as he was concerned it might have been paid to the Bank of Hawaii. The only issue here is criminal usury.

The Court: I think we will save time by allowing the question. I am frank to say that I haven't grasped this defendant's theory in the case as yet.

Q. Was this \$330 under that last question I propounded to you to pay any prepaid interest or not? A. Yes, sir.

Mr. Cades: I will move that that answer be stricken. He can't possibly testify to that because he doesn't know. Such evidence has no part in this record of any kind.

The Court: Well, he thinks it is evidence and I will leave it in there.

Q. And thereafter did this happen on various other occasions? A. Yes, sir.

Q. Now, Mr. Carey, you stopped borrowing from Hilo Finance & Thrift Company in 1938, did you not? A. Yes, sir.

Q. Can you recall the date offhand?

A. No, I cannot.

Q. Are you familiar with this?

Mr. Cades: I object to that sort very strenuously. I don't mind saying that the last note as shown by the complainant was July 13, 1938.

Mr. Moore: That is all right.

Q. Now, Mr. Carey, after you stopped borrowing did you see the treasurer of this corporation?

A. I did.

(Testimony of George B. Carey.)

Q. And who is that treasurer?

A. Mr. Hill.

Q. Mr. William H. Hill, the senator?

A. Yes, sir.

Q. Did you see him in Honolulu?

A. I did.

Q. Did you have a conversation with him with reference to the amounts due from you to the Hilo Finance & Thrift Company?

A. I did.

Q. Will you give this court the conversation to the best of your recollection?

A. Yes, sir. Senator Hill stopped into the office.

The Court: What date was it?

A. That was I think in December 1938, and inquired of me why I was not making any more loans. I explained to him that I had written him a letter explaining that I was going to discontinue my loans due to the excessive interest rates I was paying. He explained that that was one of the reasons why he wanted to see me was because he had arrangements now made so that he could make additional loans to me at a smaller rate of interest. I asked him if that rate of interest was at the legal rate of one per cent per month. He said that it was and on the reducing balances. I asked him if he could do that now, why it was that he hadn't given me that kind of a rate before. He said—

Mr. Cades: At this point I move to strike all of it, from the question, I couldn't have told what it was all about. This conversation is wholly irrelevant, incompetent and immaterial. It has no bear-

(Testimony of George B. Carey.)

ing on whether these loans were within or without the terms of the statute and could only be put in the record for the purpose of prejudice. It is therefore not within the issue.

The Court: How is it material to the issues of the case, Mr. Moore?

Mr. Moore: It is material because here we will swear to show by this testimony and also by a letter that we will offer in evidence here that prior to the passage of the Act of 1939, Mr. Carey in this conversation and other conversations requested a settlement of all of these loans. That is all of course matters herein set forth, and gave to Mr. Hill a figure on the basis that he would settle and that Mr. Hill advised him that he would settle on that figure subject to the checking by his auditors, and that after that a letter was written making a definite offer of settlement; that at that time there in reality was nothing due to Mr. Hill at all but that he offered to give him more than what he was entitled to.

Mr. Cades: (Argument.) Is this an offer to the Court in such a situation attempting to plead? If it is——

Mr. Moore: This is to show that the whole thing was terminated prior to the passage of the Act of 1939.

Mr. Cades: (Argument.)

The Court: I don't think as long as there was no final settlement I don't see how it is admissible. It is simply an offer.

(Testimony of George B. Carey.)

Mr. Moore: May it please the Court, so that we can keep the record straight I want to get this particular letter in and have it come within the rule.

Mr. Cades: I would submit a ruling to the motion to strike.

The Court: The motion is granted.

Mr. Moore: Exception, your Honor.

Mr. Moore: I will ask that this letter dated April 5, 1939, addressed to the Hilo Finance & Thrift Company by Anderson, Wrenn & Jenks be marked for identification.

Mr. Cades: I would insist that that be expunged even from the records of the court. (Argument.)

The Court: Do you want it marked for identification?

Mr. Moore: Yes, your Honor.

The Court: Let it be marked for identification although I am frank to say that it hasn't anything to do with the case, but I don't know what your theory is yet in here.

Mr. Moore: May it please the court, I understand that the letter and evidence given by Mr. Carey in this regard has been stricken from the record and the other will be denied?

The Court: I will let you mark this as an exhibit for identification.

Mr. Moore: We will offer it in evidence.

Mr. Cades: Which we object to that.

The Court: I will sustain the objection. It is simply an offer to settle.

Mr. Moore: May we have an exception?

The Court: Yes, sir.

Mr. Moore: You may cross-examine.

(Testimony of George B. Carey.)

Cross-Examination

By Mr. Cades:

Q. You have been in the sewing machine business for many years, have you not?

A. Yes, sir.

Q. And the substantial part of your business consists of selling sewing machines on installment plans?

A. Yes, sir.

Q. And it would be fair to say that you are very familiar with the methods of installment selling, aren't you?

A. Yes, sir.

Q. In connection with installment selling you also are familiar with the cost of money, are you not?

A. No.

Q. You are not familiar with the cost of money?

A. No.

Q. Do you rely on other people to advise you as to what the cost of money was to you?

A. To a great extent.

Q. However, you did know that it was more costly for you to borrow by paying interest deducted in advance than it was to borrow from banks and pay an interest after the note had matured?

A. No, I knew it was less expensive to borrow from the bank than the finance company but I knew nothing whether interest deducted in advance or paid at the end made any difference.

Q. You never sat down to compute that it would be inexpensive for you to enter into an agreement to pay interest in advance than it would to pay interest at the end of the term?

A. Yes.

(Testimony of George B. Carey.)

Q. Knowing that, you nevertheless authorized your auditor Mr. Tennent to negotiate a loan on the best terms that he could get for the borrowing of money to open this Hilo branch?

A. Yes, sir.

Q. And as a result of such authorization he did enter into the arrangement with the Hilo Finance & Thrift Company to which he has testified to in this courtroom?

A. That's right.

Q. And you heard him testify?

A. Yes, sir.

Q. You have been in court all during the testimony?

A. Yes, sir.

Q. Now, as Mr. Tennent had entered into this arrangement with the Hilo Finance & Thrift Company he told you what the arrangement was, did he not?

A. Not in detail.

Q. But in a general way you knew what the arrangement was?

A. In a general way, yes.

Q. Now, isn't it a fact you have tried to get bank loans and have persistently tried to get bank loans in order to carry on your business?

Mr. Moore: I object. That is not proper cross-examination.

The Court: It is criminal intent. I will allow the question.

Mr. Moore: May I have an exception?

The Court: Yes.

Q. And isn't it true Mr. Carey, that because your financial business was such that you could arrange bank loans you in fact did arrange bank loans because it was cheaper interest?

A. Yes.

(Testimony of George B. Carey.)

Mr. Moore: May we have a continued objection?

Q. All during the course of your loans with the Hilo Finance & Thrift Company it was your business to get the money just as cheap as you could?

A. Yes, sir.

Q. And in accordance with that business intention didn't you infer from time to time even during the course of the transactions as it has been testified by you, borrowed substantial sums from the bank? A. I did.

Q. And the thing that limited your borrowing from the bank was the fact that it was purely a credit factor, it was purely a credit risk so far as bank was concerned to determine how much bank loan they would give you? A. That's right.

Q. Now, you have testified to some length to the type of collateral security that was offered in order to keep these notes secure. You were under no obligation to make monthly borrowings that you testified to, that is correct? A. That's right.

Q. In other words, the determination each month as to whether you were going to make a finance company loan or bank loan or take part of the proceeds of the collection of the sewing machine contract which you personally were collecting, it was a matter to be determined by you?

A. Up to a certain point.

Q. You were collecting proceeds of sewing machine paper, weren't you? A. Yes, sir.

(Testimony of George B. Carey.)

Q. You were collecting the proceeds of the sewing machine paper which was pledged as collateral?

A. Yes, sir.

Q. You were also receiving money from your cash sales in your business, were you not?

A. No, our arrangement was such with our salesmen that the salesmen were allowed to hold the cash from cash sales as a part of their sales commission.

Q. Well, how about cash sales that were made at your main office. Didn't you receive cash for them?

A. Yes, sir.

Q. Didn't they go into your coffers?

A. Yes, sir.

Q. Weren't you free to use that cash or any cash received from other sources to make payment or obligations that became due?

A. Up to a certain point.

Q. What do you mean up to a certain point?

A. I mean that if it became a question of my making payments of \$2500 a month, \$3000 a month, \$2000, \$2200, any amount like that constantly every month to the loaning company I would be unable to do it financially.

Q. Financially, and then the only limitation was on your finance ability. There was no legal limitation, there was no agreement that limited you?

A. My reason for that was that, as I have stated before, the only reason that I stopped borrowing at all was because I was short of contracts that were

(Testimony of George B. Carey.)

satisfactory. If I had contracts I would never stop these borrowings; I wouldn't dare to stop them because I did not have the finances to make the payments without these renewal notes.

Q. But the determination of whether you were going to renew your business perhaps of selling a few sewing machines, that was a business determination made by you in every case?

A. Yes, I didn't want to put myself into a position where the finance company would take over the collateral.

Q. But if you wanted to there was nothing in your agreement with the finance company to prevent you from paying off the notes out of cash received, was there?

A. No, my arrangement was such that I had to produce the machine.

Q. You mean your business interest was such that you wanted to expand your interest and in an expanding business naturally you had to have more money to operate on?

A. I think, yes.

Q. That's right. So that now referring to the actual notes in question I want to direct your attention to the first notes that are involved in this counterclaim, and I refer to Exhibit 1 to 13 inclusive. Now, I refer first to the, I show you the Defendant's Exhibit 1 which is a promissory note, Defendant's Exhibit 1 is a promissory note dated April 10, 1934.

The Court: That is not the note in suit?

Mr. Cades: That is the counter-claim, the first

(Testimony of George B. Carey.)

note in the counter-claim, your Honor. Do you have the Defendant's 1-A there?

Q. Now, that note of April 10, 1934, represents a loan made according to this stipulation which has been entered into \$2330 of which \$330 was deducted in advance. It was also stipulated that you received \$1611.70 in cash and \$310.64 was paid on notes to the Realty Investment Company, \$77.66 was paid on a pre-existing loan with the Hilo Finance & Thrift Company and that you eventually repaid it and the amounts are shown there on and you received a rebate of \$54.36. You are familiar with that, is that correct? A. Yes.

Q. Now, that note has been fully paid by you, is that correct? A. Yes.

Q. And when you made these payments, the repayments you made these, repayments voluntarily without any suit being brought or any other coercion, is that correct? A. That's right.

Q. And going through the other notes I do not have to take them up individually but your testimony would be the same for all the notes that you were suing for in your counter-claim that you repaid those notes in full, is that correct?

A. Yes, sir.

Q. Your dealings with the Hilo Finance & Thrift Company was very amicable, were they not, right up to the time of the dispute at the end of 1938? A. Yes.

Q. They were? A. Yes.

Q. As a matter of fact the amounts which you

(Testimony of George B. Carey.)

were paying for the money loaned by the Hilo Finance & Thrift Company was considerably less than the amounts you were paying to the other finance companies?

Mr. Moore: May I have an objection?

Mr. Cades: I have a right now to show——

The Court: I will allow the question.

Mr. Moore: Exception.

A. I don't know.

Q. You don't know? A. I don't know.

Q. You never figured it out, did you?

A. No.

Q. Well, you had in your employ, did you not, a bookkeeper by the name of Funaki?

A. Yes.

Q. Mr. Funaki was quite an expert on the cost of money, was he not?

A. I couldn't say as to whether he was an expert or not.

Q. You had great confidence in your employee Mr. Funaki. He advised you from time to time, did he not?

Mr. Moore: We object, that is outside of the issue.

The Court: Yes, what do you want to show?

Mr. Cades: They come in on a criminal usury and when we get to them—but in order to have my record perfectly clear, I want to show that he knew the effective rates; that he had an expert employee and in fact he was advised and paid great attention to it.

(Testimony of George B. Carey.)

Mr. Moore: Is that an offer of proof?

Mr. Cades: No.

The Court: I will allow the question.

Mr. Moore: Exception.

A. No.

Q. Mr. Funaki didn't advise you?

A. Yes, he advised so far as money. I had great confidence in his ability, advising no. He gave me half a dozen different rates of interest on practically the same transactions so no one could have a great amount of confidence.

Q. He advised you, didn't he, that there were many different ways of computing effective rates, did he? A. Yes.

Mr. Moore: We have another batch of this to attach to the defendant's exhibits.

The Court: You now offer them in evidence?

Mr. Moore: Yes.

The Court: They may be received in evidence as defendant's exhibits next in order.

Q. Just to clear up a point in connection with the stipulation regarding the note dated March 17, 1936, this is one of the notes that had been included in your contemplation. It is not in that batch? The note is in the usual form according to the stipulation which is subject to check?

A. What date?

Q. March 17, 1936, that is in the new batch that was just put in?

A. That would be 20A.

Q. Note No. 9019. According to the stipulation which is subject to check proceeds of that loan were

(Testimony of George B. Carey.)

paid out as follows: \$330 was deducted in advance as interest, you received in cash \$46.88 and \$123 was paid on a note of John A. Howard, and \$121.40 was paid on a note of John A. Howard, Jr., and the remainder was credited on your pre-existing making the total amount of the loan, is that correct?

A. I couldn't say that without going over the correspondence.

Q. Well, this stipulation is subject to check. At least you were with respect to this note all applications of proceeds of loan were checked by you, were they not? A. No.

Q. Well, someone in your employ kept a current account which at least satisfied you on the amount of your existing indebtedness from time to time?

A. Yes, sir.

Q. So that, subject to check, as to the exact application your books and records showed you that the full proceeds of that loan were accounted for, is that correct?

A. I think I will answer that question by saying that I couldn't say without correspondence.

Q. Do you have your books and records in this courtroom? A. No.

Q. You don't? A. No.

Mr. Moore: May it please the court, with reference to this statement, may it please the court those three amounts that is \$46.88 appear on 20A, received by defendant \$46.88, and then paid on notes to John Howard \$123 and \$121.40 to agree with

(Testimony of George B. Carey.)

the records of the defendant, the defendant having charged against himself as received by himself the sum of \$291.28, which is the total of those three figures.

Mr. Cades: In other words, the stipulation has been checked and found to be accurate?

Mr. Moore: As to amount.

Mr. Cades: As to all facts appearing on there.

Mr. Moore: Here we have charged against Mr. Carey the sum of \$291.

Mr. Cades: I don't know what you are saying. That is no part of the stipulation.

The Court: That is all right?

Mr. Cades: There was a little wrangling. Counsel agrees that the stipulation was accurate.

Mr. Moore: Yes.

Q. With reference, I refer to note No. 9133 which is the next one in that. That is defendant's exhibit 21A. I call your attention to it.

A. 9133?

Q. Yes, the date of the note is 4/24/36, and the date of the loan is 4/25/36?

A. It is dated here April 24, 1936.

Q. That is the date, that date is the date that you signed the note in Honolulu, I assume is that correct?

A. Yes.

Q. Just to clear the record, the reason for the discrepancies of the dates of the loan and note was because your office was in Honolulu?

A. Yes.

Q. And it took some time before the notes were taken over and delivered?

A. Yes.

(Testimony of George B. Carey.)

Q. And the date of the loan was the exact date it was received in Hilo when credits were allowed?

A. I didn't know that.

Q. You knew that credits were allowed when it was received? A. Yes.

Q. So that the date of payments as shown on these various accounts always reflected at the time when the promissory note was received in Hilo?

A. Yes, sir.

Q. Now, I call your attention to the fact that in the stipulation entered into between the parties as to this particular note, \$126.50 was applied on a temporary loan that was existing. Are you familiar with that? A. No.

Q. Have you examined the stipulation by defendant's exhibit 21A and make a statement about that?

Mr. Moore: May it please the court, it is admitted that \$291.28, being the total of \$164.78 and \$126.50, that has been credited as received by Mr. Carey. Where, if the books show that it was credited on a temporary loan, that is perfectly all right.

The Court: In other words that is checked?

Mr. Cades: Checked yes, and agreed to. That does away, without the necessity of that question.

Q. Now, Mr. Carey, isn't it true that in addition to the loans which have been testified to and admitted in evidence herein, that you were making temporary borrowings from the Hilo Finance & Thrift Company for the purpose of your business, from time to time?

(Testimony of George B. Carey.)

Mr. Moore: May it please the court, temporary borrowings you say?

Q. Temporary loans? A. Yes.

Q. They were made by the Hilo Finance & Thrift Company? A. Yes, sir.

Q. Made to you for a period of one or two months, from that time? A. Yes.

Q. To tide you over for some business reason?

A. Yes.

Q. Isn't it true that many of the amounts of rebate and proceeds of the loans that are in this, involved in this case were applied in payment of those temporary loans?

A. I cannot say.

Q. But you believe that that is possible?

A. It is possible.

Q. In fact you have just heard the stipulation of counsel that on one of these notes part of the proceeds were paid to pay off one of these temporary loans? A. He says that it is.

Q. He has just stated it in the record and you are satisfied with it? A. Yes.

Q. The rebates that were paid to you from time to time that came to you in the form of a check, didn't they? A. At times, other times.

Q. And the money was yours to do with what you want? A. Yes.

Q. And sometimes the rebate was applied on account of the loans that were involved in these and sometimes they were applied on temporary notes and sometimes in your cash drawer?

(Testimony of George B. Carey.)

A. Almost all cash they were applied to the loans which is occasional.

Q. Either to the loans in this suit or to the temporary loans is that correct?

A. As I say I couldn't say about these temporary loans.

Q. Without cluttering up this record with the temporary loans, there were payments made from time to time on temporary loans on \$82.50, isn't that an amount of rebate, of the usual rebate on your proceeds? A. Yes.

Q. It is quite possible you used the rebate to pay off other loans? A. Yes.

Q. So that when it is stated hypothetically that the only cash received by you in this proceeds of 15 loans, there is a certain sum that may or may not be accurate?

Mr. Moore: I object to that.

Q. I will withdraw that. You don't know the amount of cash you got from temporary loans?

A. Yes.

Q. You don't have the books and records and you don't know what the amount of the temporary loans were?

A. We have them in Honolulu.

Q. But you don't have them and you haven't produced them in court? A. No.

Q. But you would say to the court that from time to time you had additional borrowings?

A. Yes, only a short period of time possibly 60 days on some wholesale transaction.

(Testimony of George B. Carey.)

Q. And you received cash in these temporary loans? A. Yes.

Q. And some of the cash you received was paid over out of the proceeds of the loans that are in this case?

A. I am not certain as to that.

Q. One of them has been testified to, admitted by your own counsel and there may be others, may there not? A. Maybe.

Q. It is quite possible but if they were paid you don't know now? A. That is right.

Q. Now, Mr. Carey, the Hilo Finance & Thrift Company have never foreclosed on any of this collateral, have they?

A. They threatened to.

Q. But they never have, have they?

A. No.

Q. There have been no foreclosures for you to attempt to collect the collateral?

A. No, there was a notice served on me that—

Q. That they might or would but that is all?

A. Yes.

Q. You have explained at great length as to why you had no borrowings in 1935 and you paid out of your own proceeds, you remember that testimony? A. Yes.

Q. That was merely due to the condition of your own business, is that correct? A. Yes.

Q. It had nothing to do with this agreement with the Hilo Finance & Thrift Company, did it?

A. No, only that I could not supply the particular contracts.

(Testimony of George B. Carey.)

Q. And you weren't violating any undertaking that you had entered into with them when you stopped borrowing during that period of time?

A. No.

Q. You were free to borrow or not to borrow as you saw fit? A. Yes, sir.

Q. Your monthly payments were due in installments one month after the date of each loan, is that correct?

A. No, sir, they were not.

Q. They were not? A. They were not.

Q. What do you mean by that?

A. I mean that I was told that the payments could be made any time during the month irrespective of the date of the note.

Q. In other words, it was an understanding that you had a period of grace after each installment became due, is that correct?

A. Well, it could be put that way.

Q. That is if the installment according to the loan was due on the 6th, it was your understanding that you could pay that at any time before the 30th without a delinquency?

A. Yes, that is right.

Q. Was that part of the agreement with the Hilo Finance & Thrift Company?

A. That was in letter form.

Q. That was the understanding of your right?

A. Yes.

Q. In other words, it was your duty to make these installments prior to the expiration of what-

(Testimony of George B. Carey.)

ever days there were in the following month before the end of the month? A. Yes.

Q. And that might be a period of grace between two weeks or three weeks so much as 28 days?

A. That's right.

Q. That was the understanding?

A. Yes, sir.

Q. And of course no delinquent interest was charged to you at any time on any accounts that are involved in this litigation, is that right?

A. Yes, delinquent interest was charged.

Q. Delinquent interest was charged. Will you state specifically on what notes and on what payments?

A. Now, on these particular ones in question, possibly more in these particular ones in question.

Q. Do you want to reconsider your answer?

A. Yes.

Q. What is your answer then?

A. Well, what notes are involved are the notes in our counter-claim involved in this transaction. Then the answer is, yes.

Q. That the delinquent interest was charged?

A. Yes.

Q. Where are all the notes and where are all the stipulations, will you point out in any particular wherein delinquent interest was charged, to the court?

A. I can show you statements made up by the Hilo Finance & Thrift Company and my auditor requested that I pay interest on notes that had

(Testimony of George B. Carey.)

already been paid off, that is what I mean, notes that I had paid off and had returned to me.

Q. Perhaps you didn't understand my question. You understand the interest you paid in advance to each note? A. Yes.

Q. In addition to that interest which was deducted in advance each time a loan was made did you pay on any notes involved in this counterclaim delinquent interest?

A. I did not pay it but I lost the rebate because I didn't pay it.

Q. On 8 notes you lost rebates because your payments were not prompt?

A. I lost rebates on delinquent interest on notes that I had already paid off one year and a half or two years prior to that. They hitched up a list of delinquent interest that totalled the sum of \$665, charging me on notes that had already been paid off.

Q. Now, just a moment remember you are on the witness stand and under oath and you want to be careful about your statement. A. Yes.

Q. There were certain notes involved in this counterclaim where no rebates were given to you, is that correct? A. Yes, sir.

Q. Now, it has been stipulated as to what all the payments were on your notes in the counterclaim? A. Yes.

Q. You have seen the stipulation?

A. Yes.

(Testimony of George B. Carey.)

Q. Aside from the loss of that rebate it has been fully testified to, was there any other thing in the matter, was there ever any charge made to you for delinquency in the notes that were covered by the counterclaim?

A. Well, if you can consider that the loss of the rebates was due to the fact that they offset them by charging me with delinquent interest, yes, you could say so.

Q. But they didn't in fact charge you with delinquent interest. You were getting the rebate, oh, you didn't get a rebate?

A. Yes, I didn't get a rebate if I didn't pay the delinquent interest they demanded, I wouldn't get the rebate.

Q. You have heard the agreement testified to; you were in court? A. Yes.

Q. That agreement was negotiated for you by Mr. Tennent? A. Yes.

Q. I understand you to say that the agreement as testified to was an accurate one, that that was an accurate statement? A. Yes.

Q. The agreement was that if you didn't pay promptly or within or before the expiration of the next succeeding month with that small period of grace, that you would lose your rebate, wasn't that the agreement? A. Yes.

Q. In other words, the rebate was a benefit given to you for prompt performance?

A. Yes.

(Testimony of George B. Carey.)

Q. Notwithstanding that you didn't promptly perform on the money of the notes and the rebates were given to you, is that accurate?

A. Yes.

Q. As to some notes of the Hilo Finance & Thrift Company, if you have any explanation——

A. On some no rebates were received even though the payments were made promptly.

Q. Involved in a litigation in this case?

A. Yes.

Q. You have access to all the records of the files and I want you to say to the court which contracts they were specifically and take all the time you want to answer that question. If you have to consult with any of the books or records you are free to do that.

Mr. Cades: I suggest that the noon hour has come.

Mr. Moore: We have no objection.

Mr. Cades: We will offer that in due time as part of our defense.

The noon recess was had and at 1:30 all parties to the proceedings being present, the following testimonies were taken:

Mr. Cades: May it please the court, if you will recall we had some figures on the blackboard and I have just transposed that on a sheet of paper and it is put in the same way that Mr. Tennent was figuring on the two per cent interest basis. That is to be marked for identification.

The Court: Just mark it for identification, mark it the next number in order for identification.

(Testimony of George B. Carey.)

Mr. Cades: It is understood that that is in evidence but merely an explanation of a hypothetical question, defendant's exhibit No. 2.

Q. You were to tell the court that although there was prompt performance, there was no rebates given to you. Have you prepared yourself on that question, Mr. Carey? A. Yes.

Q. Will you state to the court what those notes were? A. Notes 9995.

Q. Dated what, January 7, 1937?

A. Yes, sir.

Q. What else? A. 9899.

Q. Dated December 1, 1936, is that right?

A. That's right. Our records show that 9995, the maturity date was April 9 and it was paid on April 30, and no rebate was received.

Q. What year?

A. 1938. And on 9899 the record shows the maturity date as being March 1, 1938, and was paid on March 31, 1938.

Q. Does your record also show that the monthly installments were paid within the period of the due date? A. Yes, in my contention——

Q. Wait a minute, I don't want your contention. If your records show that I want to know that?

A. Yes.

Q. The records show that the installments were paid promptly? A. Yes, sir.

Q. I understand then your testimony is that on each of these notes one January 7, 1937, and one

(Testimony of George B. Carey.)

December 1, 1936, the installments were paid for either on or before the due date of the monthly installments and the note was discharged in accordance with its terms and no rebate was given to you?

A. That's right, on 9995 there was no rebate and on 9899 there was a rebate of 82.

Q. There was a rebate of 82?

A. Yes, 82 whereas 110 was the agreed amount.

Mr. Moore: May it please the court there are 9 more of these tabulations, as before and we will ask that these be admitted in evidence and be attached to the notes to which they correspond.

The Court: They may be received.

Mr. Moore: Under the same conditions.

Mr. Cades: As part of the stipulation.

Mr. Moore: Yes, sir.

Mr. Cades: That begins with defendant's exhibit 22-A.

Mr. Moore: I understand that they are not in order but you will have to check with the notes themselves in order to get it in the proper order because there are some in the middle that are not there——

Q. Well, now, let's take No. 9899, the rebate on that, the admitted rebate received was 82, is that correct? A. That's right.

Q. And your contention is that you were entitled to how much more rebate under the contract existing? A. \$27.50.

Q. Was demand ever made for that amount; did you ever request the plaintiff to pay you rebate of \$27.50? A. I requested it.

(Testimony of George B. Carey.)

Q. In writing? A. Yes.

Q. Will you produce the copy of the letter in which that request was made?

A. Here it is.

Q. I show you a letter, a copy of what purports to be a letter addressed to the Hilo Finance & Thrift Company dated November 29, 1938, and ask you whether that is a copy of the letter you sent to that company? A. Yes.

Q. Will you separate that from your file? I want to introduce that in evidence.

A. I think the schedule that is attached to that letter should be filed, too.

Mr. Cades: Before introducing this in evidence, I would like to read it because it is so pertinent and it shows clearly because here is a man whose own letter, it shows with respect to his attitude on rebates.

Mr. Moore: I object to it.

Mr. Cades: Shall I offer it first before reading it?

Mr. Moore: Subject to our objection.

Mr. Cades: Subject to your objection it will be offered in evidence and your Honor is asked to rule on it. (Reads the letter.) I offer that letter in evidence.

The Court: It may be received in evidence.

Mr. Moore: May we have an exception?

The Court: Yes.

Q. As a matter of fact, in accordance with the letter what you were requesting was a modification

(Testimony of George B. Carey.)

of the agreement along an equitable line in view of the fact that you were hard pressed, is that correct?

A. No, it was in the form of a fair and equitable arrangement that——

Q. That is correct, you thought it was more fair to you that in such a time your agreement if you didn't default in all of your installments that you should get some part of the rebate?

A. Yes, but——

Q. But your agreement was not to that effect. You were asking for a modification of your agreement along the equitable lines that you were suggesting, is that not correct? A. Yes.

Q. And with the exception of these notes concerning which you say \$27.50 was due you and concerning which on the other note how much do you consider was due you on 9995; what did you consider was due you on that one? A. \$110.

Q. With the exception of those the other rebates were paid satisfactorily to you in accordance with the agreement, is that correct?

A. Well, this letter of the rebates to all of those notes it refers to where the one-third rebate of the interest was to be refunded to me.

Q. How many?

A. Of which three in——

Q. But these are the only two which you contend there was anything near proper performance, is that correct? A. Yes.

(Testimony of George B. Carey.)

Q. The others were clear? A. Yes.

Q. So that the only two under any stretch of imagination that could be in dispute would be the amount of \$24 on one and \$110 on the other, is that correct?

A. That is correct, that is right.

Q. You have testified that there were temporary loans that were made in the course of your dealings with the Hilo Finance & Thrift Company, is that correct? A. Yes.

Q. That they have——

Mr. Moore: May we have an objection to that line; may we have the same objection and exception?

The Court: I don't remember your objection.

Mr. Moore: We object to this as being incompetent, irrelevant and immaterial, not being within the issues here. The fact that some of the funds that Mr. Carey received from these notes that is his payments in cash to him or credited to some other account is what he has done with the funds other than the application on these notes is immaterial.

Mr. Cades: (Argument.)

The Court: I will allow the question.

Mr. Moore: Exception, and a continuing exception.

Q. Do you know what the rate was that you paid on your so-called temporary notes that were given to you to tide you over?

A. I can't state accurately.

Q. Would it refresh your memory if I showed you the accounts, where it showed the account?

(Testimony of George B. Carey.)

A. No, it doesn't show anything about the rate of interest. I can't see the rate of interest on these cards. It says cash interest but no amount.

Q. Very well, do you have any records that would enable you to tell the court what the amount of your temporary borrowing was from this company? I think you testified that you had before.

A. I think I could pick it up.

Q. On the records that you have with you?

A. Not for an absolute certainty.

Q. You do know for a fact that on these temporary loans the interest was not deducted in advance; you do remember that, don't you?

A. Yes, sir.

Q. And that the interest was merely paid at the end of a loan, is that correct?

A. Yes, that is so.

Mr. Cades: Very well, your Honor, we will have to put this on by our own witness.

Q. And you also recall that the rate that was charged you on this loan was not in excess of one per cent a month? A. No.

Q. You don't recall that. You have no recollection as to what the interest rate is? A. Yes.

Q. But you did get the money which was used in connection with the same contracts about what you have been testifying, is that correct, proceeds of these temporary loans you used in part to pay your business obligations? A. No.

Q. What were they used for?

(Testimony of George B. Carey.)

A. They were used to pay the freight and charges on a few shipments of sewing machines that came down on a wholesale arrangement.

Q. And when the sewing machines were so purchased and were so paid for the proceeds went to you, did they, the proceeds of sales all went to you?

A. I can't say the proceeds all went to me, no.

Q. Well, you were the owner of the material that was bought from these loans? A. Yes.

Q. And when you sold them then the proceeds belonged to you?

A. Not all of the proceeds. You said all of the proceeds. If you are going to be that technical, no.

Q. The proceeds to you were your profit, weren't they? I am not trying to be technical. I am trying to get you to answer the questions correctly.

A. Yes.

Q. And you paid for some of these temporary loans by borrowing on the collateral loans, didn't you?

A. Borrowing on the collateral loans.

Q. Yes, but the proceeds of the collateral loans which have been testified to, a portion of the proceeds were used for paying off these temporary loans to which you have referred?

A. Not that I know of.

Q. Well, in other words, you don't agree with your counsel. There is a stipulation that was entered into; was that a valid stipulation?

A. These wholeasle transactions have nothing to do with it.

(Testimony of George B. Carey.)

Q. Let's go over that again then, Mr. Carey. You made temporary loans from the Hilo Finance & Thrift Company for your own business purposes, is that correct? A. Yes.

Q. You repaid the loans, didn't you?

A. Yes.

Q. And to repay the loans you used at least a portion of the proceeds that you borrowed under the notes that are in evidence in this case, is that right?

Mr. Moore: We object, that is not the evidence here. The testimony here is that on these temporary loans there appeared payments of \$82.50 and similar amounts that were rebates. (Argument.)

The Court: I think that is the evidence.

Mr. Cades: It appears right in the stipulation, defendant's exhibit 21A that a portion of that loan was used, paid on a temporary loan as conceded by counsel and checked by counsel. I don't think that I need pursue on that line. I think perhaps it is shown by the written testimony. (Argument.)

Q. Now, Mr. Carey, you have been very successful in your business, have you not?

Mr. Moore: I object to that. What has that got to do with this case if he is successful or going broke or what.

Mr. Cades: Well, you dragged it in.

The Court: I will allow the question.

Mr. Moore: Exception.

A. I presume that you would consider it as having been successful.

(Testimony of George B. Carey.)

Q. Well, the loans that are involved in this case represent it.

Mr. Moore: May it please the court, I understand this is the balance of the stipulations that are attached to each of the notes. I will offer these in evidence under the same condition as the former one and will ask that they be attached to the notes that bear a corresponding number.

The Court: It may be received.

Mr. Moore: And so marked for I further recall it was stipulated that there is 4 notes missing and 4 of those 4 notes is in evidence so that those will come in in the order of time so that the sheet itself will be the exhibit for that particular transaction.

The Court: I suggest that counsel get together and see that the exhibits are all in order.

Mr. Moore: We will do that.

Q. Well, in any event when the final payment was made of all the notes other than the notes that are subject of this counterclaim, I mean other than the notes of the plaintiff's suit, you know the ones, the 8 notes that are sued on, you were able at that point to get sufficient bank credit to dispense from further borrowings from the finance company, is that correct?

Mr. Moore: That is also subject to our objection.

The Court: Very well.

A. Why, no.

Q. I thought you said that you had applied from time to time from the banks and you were trying

(Testimony of George B. Carey.)

to get bank loans and you eventually succeeded, when you succeeded in getting bank notes?

A. September of 1936.

Q. That was some and did they increase?

A. I got some in 1932.

Q. That is right, you got some in 1932 and 1936 and as the amount of bank loans increased the amount of the finance company decreased, is that right? A. Yes.

Q. That is a fair statement? A. Yes.

Q. And you also testified that you not only borrowed from this finance company but other finance companies, the bank from time to time and you put up collateral in your business to support all the various loans, did you not? A. Yes.

Q. I show you here a form entitled collateral form for pledging of contracts and the first date filled in is estimation of amount due by purchasers due on contracts assigned for November 1, 1938, and I will ask you to examine that; will you explain that that form is, please?

A. Why that is a form that was prepared by the firm of Tennent & Greaney.

Q. Quarterly or monthly?

A. For showing the various finance companies, the banks, White Sewing Machine Company, any firm that I was indebted to that the condition of the collateral that was supposed to be checked by Mr. Tennent every four months, I think.

Q. Every four months and a form similar to this was prepared and filed with all interested parties every four months according to you? A. Yes.

(Testimony of George B. Carey.)

Mr. Cades: If your Honor, please, I ask that this be admitted in evidence as showing the manner in which this collateral was handled.

The Court: It may be received in evidence and marked plaintiff's Exhibit next in order.

Q. Now, from this exhibit it would appear that on November 1, 1938, \$209,760 worth of collateral. Does that refer to the face amount of the collateral?

Mr. Moore: May it please the court, I am going to object to any questioning of this except that insofar as it applies to the Hilo Finance & Thrift Company. (Argument.)

The Court: Is he able to tell how much of this money just applies to the Hilo Finance & Thrift Company?

Mr. Cades: Our point is this; we are not going to pursue it for the rest of the afternoon, but we have put in testimony about the going into the perfection of this collateral. As a matter of fact this exhibit will show that so far as the finance companies received by way of collateral—— (Argument) That is the reason I objected to any testimony on the collateral.

The Court: All right, I will allow it.

Mr. Moore: May we have an exception?

The Court: Exception, yes.

A. That's right.

Q. That refers to the face amount of the collateral? A. Yes.

Q. By the face amount of the collateral you mean the amount of the unpaid balance of the per-

(Testimony of George B. Carey.)

sons who have purchased sewing machines and the amount owing by them to you?

A. Yes, that's right.

Q. Now, will you state to the court what the difference was in the face amount of the collateral offered between the cash price of the goods that were sold and the time price of the goods that were sold covered by the agreement? A. No.

Q. You can't? A. No.

Q. Didn't you not sell machines on time and a financing charge was made by you, was it not?

Mr. Moore: I object to what his business was; what has that got to do with this case.

Mr. Cades: (Argument.)

Mr. Moore: I object, that is irrelevant and immaterial and has got nothing to do with the issues of this case, improper cross-examination and highly prejudicial.

Mr. Cades: (Argument.)

The Court: I will allow the question.

Mr. Moore: Exception, and continuing objection and exception to this line of questioning.

A. No, it was not.

Q. In other words, you sold machines for the same amount of cash that you did if you sold it on an installment plan? A. No.

Q. There was some difference between the cash price and the time price? A. That's right.

Q. For your information by the statutes of the Territory of Hawaii it is defined as a financing

(Testimony of George B. Carey.)

charge. I will show it to you in the book. You did in fact make a charge for the privilege of paying on time to your customers?

A. From that standpoint, yes.

Q. And isn't it true that a machine that ordinarily sold for \$79 for cash, sold for time payable over 15 months for \$200, is that approximately correct? A. No.

Q. Well, what would a \$79 machine sell for, the cash price \$79?

A. Do I have to answer that question?

The Court: Yes, go ahead and answer that question. Repeat the question.

Q. What would a \$79 machine sell for, the cash price \$79 if payable in installments, in 15 months?

Mr. Moore: Is that the price it had cost Mr. Carey or the price he sold it for for cash? We object, it is unintelligible; it is not fair to the witness.

The Court: Objection will be sustained.

Q. The usual unit of a sewing machine imported into the Territory of Hawaii cost you what, Mr. Carey, a sewing machine that became the subject of these collateral agreements?

Mr. Moore: I object to it.

The Court: You have your objections to it.

A. Do I have to answer personal questions of that kind?

The Court: Yes, answer the question that is put to you.

A. Well, they were different prices.

Q. We understand.

(Testimony of George B. Carey.)

A. Each machine and each style of machine that I purchased had different prices.

Q. All right, take the highest priced type of unit, how much did that cost you imported?

A. Probably around, if I remember, \$75 to \$80.

Q. At what period during this transaction, what years? A. From 1936 on.

Q. And cost you \$75? A. Yes, sir.

Q. Imported into the Territory of Hawaii?

A. Yes.

Q. All right, when you sold that machine for cash you had one price and you testified when you sold it for time you had another price. What was the cash price on that machine for resale, \$75 machine? A. \$220.

Q. Cash? A. To a retail customer.

Q. Cash, what was the time price on that machine if sold over a period of 15 months?

A. That was the time price of \$220.

Q. What was the cash price, I beg your pardon?

A. It would be about \$20 less.

Q. About how much less?

A. \$20 less.

Q. In other words, the cash price was \$200 on a \$75 unit imported if you sold it for cash and \$220 if sold on time, is that right?

A. That is about right.

Q. So that you had charged in your financing plan approximately \$20 on \$200 for 15 months?

Mr. Moore: We object to that.

(Testimony of George B. Carey.)

The Court: The objection will be sustained.

Mr. Cades: I have nothing more, your Honor.

Redirect Examination
Of George B. Carey

Mr. Moore: That is all, Mr. Carey.

Mr. Moore: The defendant rests.

Mr. Cades: Our evidence for defense is very little, your Honor, but before proceeding I want to move now that the defendant's counter-claim and set off be non-suited for the following reasons: one, that they have shown by the evidence that the payments made were voluntarily paid pursuant to an agreement or agreements entered into between the plaintiff and defendant and that the defendant is not entitled to recover any sum so voluntarily paid or any part thereof. Secondly, that it affirmatively appears that the amounts charged were within the provisions of the money lenders act of 1933. I had better identify that, Act 154 of the Session Laws 1933, and were also within the provisions of Act 231 of the Session Laws of Hawaii 1937, the Industrial Loan Act, and finally on the third ground that it affirmatively appears from the evidence that if the defendant had any claim whatsoever for the recovery of interest so voluntarily paid, that the same is generally procured and is uncollectible under the provisions of Act 75 of the Session Laws of Hawaii, 1939. That is our motion. Fourth, that there is a fatal variance between the pleading and purchases that is adduced in this case. I think it might be,

your Honor, that if the argument is to be had tomorrow, I think their evidence is very slight on the defense and that could be reserved, a ruling made on that. I have no objection on that if counsel is willing.

Mr. Moore: That is all right.

Mr. Cades: With the understanding that it would be in no way prejudicial.

Mr. Moore: Yes.

Mr. Cades: There is one deposition.

Mr. Moore: We have no objection to the deposition which is to be admitted into evidence.

Mr. Cades: Would it save time if we would read the deposition into the testimony?

The Court: I think you can just file it. You have the right to read it.

Mr. Moore: I will stipulate that it has been read.

Mr. Cades: And it may be received without objection of the defendant as though read in evidence.

The Court: If that is agreeable, all right.

Mr. Cades: I have about two questions from Mr. Tennent and the case is ready.

MR. HUGH COPPER TENNENT

resumes the witness stand.

By Mr. Cades:

Q. You have already been sworn, Mr. Tennent?

A. Yes, sir.

Q. Mr. Tennent, are you auditor for the Realty Investment Company, Limited? A. Yes.

(Testimony of Mr. Hugh Copper Tennent.)

Q. That is a Hawaiian corporation?

A. Yes, sir.

Q. You state for the purpose of the record whether that corporation has different stockholders than the Hilo Finance & Thrift Company?

A. It has entirely different stockholders and different directors.

Q. Its books are kept separately?

A. Its books are kept separately.

Q. And it has returns filed separately?

A. Filed separately. There are two separate companies, not linked in any way except by being operated out of the same office. Some of the executives are the same.

Q. Mr. Carey, testified that in spite of a perfect performance under note No. 9899 dated December 1, 1936, he was allowed a rebate of 82 whereas he should have been allowed a rebate of \$110. Do you know anything about that transaction?

A. May I see the note?

Q. The note?

A. I mean the stipulation.

Q. The stipulation as to payment?

A. Yes.

Mr. Cades: The witness is looking at defendant's exhibit 22-A it is the note No. 9899. It should be dated December 1, 1936.

A. These are the last two typed. It looked to me as if the one you have given me is not right.

Mr. Cades: Carey has testified under oath that

(Testimony of Mr. Hugh Copper Tennent.)

9995 has a perfect performance and counsel stipulated with me the dates there were a lapse in there about three months.

Mr. Moore: Here is the situation on that, may it please the court, and the situation was this, that in Honolulu there were certain dates that were put down in the ledger and there is a different date here in Hilo. I stipulated with Mr. Cades that he could put on here the Hilo dates, so that there is the situation on that.

Mr. Cades: That doesn't account for—Here is a mathematical problem. The only reason I call counsel's attention, 9995, if your Honor will recall, is one of the notes Mr. Carey testified had perfect performance, 13037. If your Honor will look down 2334 the payments are made one in February, and one April, and one in March and June and none in May, none in June and they pick up in July again. I just want the record to show it. Mr. Carey may have made a mistake.

Mr. Moore: May it please the court, here is the situation. Mr. Carey testified that from his ledger the due date from his note was April 2 or 6 and according to his ledger it was paid on April 30.

Mr. Cades: We asked him whether that included all installments and he said, yes. I said, you are sure of that, and he said, yes. I don't want to catch counsel by surprise. I want the facts to be correct before the court. (Argument.)

(Testimony of Mr. Hugh Copper Tennent.)

Mr. Moore: I will admit, Mr. Cades, for the purpose of this record that these two notes according to the stamped payment on the note each of these two notes, they both appear to be in default and in default further than the month in which they were to be paid.

Q. Mr. Tennent, I show you 8 cards that are headed George B. Carey and are designated as temporary loans. I will ask you to look at these cards and state to the court if you are familiar what they are?

A. Yes.

Q. Will you explain what they are?

A. The finance company made temporary loans for which the charge there appears to be \$7 or is about 7 per cent same as about a bank rate.

Mr. Moore: I object to that.

Q. Just explain what the cards are?

A. They are entitled temporary loans and represent payments temporarily loaned by the Hilo Finance & Thrift Company to George B. Carey.

Q. These are part of the books of the original entry of this concern?

A. Yes.

Q. That is on here the disbursements and the receipts as made are recorded originally?

A. Our record, yes.

Q. And these are books of original entry?

A. Yes.

Q. And these cards came from the ledger of this concern, you know that of your own knowledge?

A. Yes.

Q. Before introducing them, I will first introduce them in evidence.

(Testimony of Mr. Hugh Copper Tennent.)

Mr. Moore: May it please the court, we object to the introduction of these on the grounds that they are incompetent, irrelevant and immaterial, and having nothing to do with the notes here in trial.

The Court: It may be received in evidence.

Mr. Moore: Exception.

The Court: You may have an exception to all of these.

Mr. Moore: There will be a continuing objection and exception to all of this line of testimony.

Mr. Cades: Your Honor, please, counsel has stated to us that they raise no objection that they did not come from the proper custodian and treasurer.

Q. Will you examine these? From these ledger cards the amount of the loan is shown as the first item on each card? A. Yes.

Q. And the amount of interest is shown as payment of interest? A. Yes.

Q. And that was computed, the interest in the case of temporary loans was not deducted in advance, is that right? A. No.

Q. And it was computed at simple bank rates?

A. Simple bank rates.

Mr. Cades: That is all.

Cross-Examination

By Mr. Cass:

Q. Mr. Tennent, the other day when you were testifying, a hypothetical question was placed to you of what would happen if 14 or 13 notes had been ar-

(Testimony of Mr. Hugh Copper Tennent.)

ranged for to be paid back without any cash by the proceeds of other notes?

Mr. Cades: If Your Honor, please, this is highly improper cross-examination.

Mr. Cass: Just a moment, I am going into this examination as much in detail as you are. I am not cross-examining him.

Mr. Cades: Finish your question and I will note my objection.

Q. This hypothetical question you answered that after the 13th note there would be no money and thereafter the account would have to be renewed by new borrowings or by payment of cash to keep it in status quo, is that right?

Mr. Cades: Your Honor, please, I object. This witness has been put on purely for formal matters——

The Court: Do you want to reopen your case?

Mr. Cass: Your Honor, please, the subject of this account, this whole account this witness testified the other day was in accordance with an agreement.

The Court: That is right.

Mr. Cass: Which he reached back beyond that covered every running transaction in this detail.

The Court: That is correct.

Mr. Cass: When they put the witness back on the stand and started to ask him about that particular account and then the subject of that contract is open to cross-examination.

The Court: Yes, but Mr. Moore had the right at that time.

(Testimony of Mr. Hugh Copper Tennent.)

Mr. Cass: I have the right also on the reoponing. I would like to reopen that if the court will allow me to.

Mr. Cades: And you put the gentlemen on as your witness.

The Court: You may ask him. This is recross-examination.

Q. (By Mr. Cass): That is the situation in the hypothetical question, is it not?

A. You would have to go back and ask questions as they were before. I can't say, yes, to that.

Q. Would a series of computations on a note for \$1165 in which the payments run out in 13 payments, on the 14th note. A. On the 14th note.

Q. Thereafter the man got no more money for any extensions that he borrowed?

A. Yes, he continued therein on that basis.

Q. Now, in the actual transactions with Mr. Carey was there a time in this general loan agreement when that situation in fact existed that he had borrowed so much money on notes that he could no longer borrow on the same kind of notes without putting in additional money or repaying some of those notes?

A. I think you will find that once or twice that condition went along.

Q. For several months or a year or more?

A. Three or four months I imagine.

Q. And that at the end of that period or at the time when this last note was due and Mr. Carey had to borrow this money as you say he did, he could

(Testimony of Mr. Hugh Copper Tennent.)

have wiped out the entire borrowing by paying off all installments that were then due or that were represented on the note, could he not?

A. I don't quite understand the question. You mean he could have wiped out the \$6942.

Q. If he brought that into the office yes, plus the interest that had been charged on the note into the office, he could have wiped out the entire account, could he not?

A. Yes, of course if he brought the money in, sufficient money in to pay it.

Q. A letter is introduced in evidence here signed by you in which suggestion is made that the Hilo account be paid off. That letter was dated December 30, 1936.

Mr. Cades: Your Honor, please, that is a misstatement of the evidence.

Mr. Cass: Let's have the letter, please. The letter speaks for itself. Is this your letter, Mr. Tennent?

A. Yes, a letter signed by myself.

Q. In that letter I am reading: "I must ask you therefor to arrange to withdraw these contracts within the next few days by repaying all of the Hilo loans or at least that portion which is not covered by Hilo contracts." That was your suggestion?

A. I think the whole letter is a part of that. It is impossible to take four lines out to get the meaning.

Q. That is what you said to arrange to pay off the whole Hilo loan?

(Testimony of Mr. Hugh Copper Tennent.)

A. No, I'll read the whole letter and then the sense is carried.

Mr. Cades: Strictly, that is a motion to strike. The letter speaks for itself.

Q. If Judge cares to hear it Mr. Tennent can read it.

A. December 26, 1935 (Reads the letter.)

The Court: What do you want to ask him about the letter?

Mr. Cass: I asked him whether or not he didn't suggest to Mr. Carey to pay off the Hilo loan, and he said, it is contained in the letter. It is the understanding——

Mr. Cades: Wait a minute, he is going to explain.

The Court: Just a moment.

A. What the letter means is that Mr. Carey sent over contracts of some other item than Hawaii. The agreement with the Hilo Finance & Thrift was that it was to be local contracts of this Island, but he sent them over, the Hilo Finance & Thrift made that particular loan and when I went over there to audit the matter as an auditor of the Hilo Finance & Thrift Company, the matter was drawn to my attention or I found it in examining it—I couldn't tell you—but at any rate it was not in accordance with the agreement, so that letter is suggesting that that particular loan of \$2000, whatever it was \$330, be either paid off, that particular one, because the collateral was not the kind of collateral that he sent over, Hilo contracts, in exchange for the others. I

(Testimony of Mr. Hugh Copper Tennent.)

admit the way the Hilo loan should be paid off means that loan and the answer of the letter will show that. There was never any suggestion that the whole of the loan should be paid off because some of the collateral sent out was not——

Q. What do you mean by differentiating in this letter between all of the Hilo loans or at least that portion which is not covered by Hilo contracts?

A. Because some of the contracts sent out would be Hilo contracts, might be \$1000 of that \$2330.

Q. But all of the Hilo loan to your mind means to only so much that refers to the Honolulu contract?

A. That refers to one contract \$2330 but that particular loan, the collateral that was sent over with the loan was mostly of contracts from some other Island.

Mr. Cass: Well, the letter speaks for itself, Your Honor.

Q. Now, you have said that Mr. Carey had the privilege if he wanted to of coming in at any of these terms and putting the money down and redeeming all the notes and collateral, is that right?

A. Yes.

Q. Then, when at the end of this 13th month Mr. Carey, or whatever month it was, that Mr. Carey had exhausted his borrowing capacity without fresh money, if he had come in and put down the amount then, he could have taken all of his notes out with the collateral and that would have ended the loan?

A. He could have gotten his rebates.

(Testimony of Mr. Hugh Copper Tennent.)

Q. And the account then stated was the amount due on all the unpaid installments on the loans then in the hands of the Hilo Finance & Thrift Company?

A. I think if the note called for a 15 month loan he had come in and wanted to pay it off, the practice of the finance company was to rebate the interest.

Q. Yes, I wasn't speaking of that.

A. He could have got large rebates but he was due——

Q. To come there at any time and they would strike a balance of the amount that was due at that time and he would pay over the money?

A. Yes.

Q. In order to get an extension when you have to move that same amount of money forward a whole month he had to put in a new note which would pick up the oldest installment on all the notes in the Hilo Finance & Thrift Company and in addition thereto he would have to pay interest on the new note that he put in. I am asking what the agreement was?

Mr. Cades: I object if this is a hypothetical question.

A. There was no agreement that Mr. Carey should borrow every month. If he chose to come in and borrow that month, he could apply the payments the way he liked. If he wanted the cash he could take cash; if he didn't want cash he could apply it on some other notes and of course he could apply it on all kinds of notes. It was up to him.

(Testimony of Mr. Hugh Copper Tennent.)

Q. But in order to extend the note and move all bonds and notes, cancel old notes and put new notes in it, he had to pay the prepaid interest on the note, isn't that true?

A. There was no extending, as I see it, to extend the note. He came in with the new note and if all those payments were going to be applied on back notes, obviously he would have to pay the——

Q. He would have to pay then, at the beginning, he would have to pay on that note the amount of prepaid interest for that type of note that he put in?

A. It was well shown in the demonstration here.

Q. That would be in the case of, \$330 notes that he would have to prepay and now the next month that came along if he had done that when he put in a note he had to pay another \$330 and complete the process, is that right?

A. That is the way that he chose——

Q. That is the way he chose to do it and the way that it was done.

A. You can find out in some instances in your sheet probably where all the proceeds from the notes were applied on other notes. Therefore it was obvious that some payments was made to the company. I think we showed yesterday that if you took your example, you started to show that in this hypothetical case you would keep on loaning money for 13 months, the company never got a dime back. Obviously that point must come where the company is going to get something back in the way of interest.

Q. I was not disputing that, Mr. Tennent.

(Testimony of Mr. Hugh Copper Tennent.)

A. So that obviously otherwise the company would be loaning its money for nothing, so that if you took such a hypothetical case you would reach a point sometime where there must be some money going to the company.

Q. I was speaking to the actual thing that happened. When Mr. Carey didn't get any money by the raising of new loans, he paid \$330 and put in a new loan to cover the back installments, did he not?

A. I am sure you will find some instances here and there but it is by no means a constant occurrence at all.

Q. Now, you testified yesterday, Mr. Tennent, that the amount of interest, the lowest amount that you testified to on any of these loans was 14.1 per cent in anyway of figuring these loans of discount or otherwise?

Mr. Cades: We object, that is a misstatement, Your Honor. The rate was 14 per cent. (Argument.)

Mr. Cass: I agree, that is the statement. If rebates were allowed, it was 14 per cent.

Q. Now, Mr. Tennent, I will show you a carbon copy of a letter which apparently bears your initial and ask you if that is your letter?

A. That is my letter.

Mr. Cass: We offer in evidence the letter dated January 20, 1939, directed to the Hilo Finance & Thrift Company and signed by Tennent and Greaney, Mr. Tennent, president.

Mr. Cades: We object to the admissibility of the letter. It is nothing more than a statement of two

(Testimony of Mr. Hugh Copper Tennent.)

parties trying to settle the matter of a rebate.

(Argument) It will merely confuse the record even further.

Mr. Cass: The letter is offered to show that Mr. Tennent advised the Hilo Finance & Thrift Company that even after deducting all the rebates that might be allowable, the effective rate of all these loans were 16 per cent with a thirty-three and a third per cent rebate allowance.

The Court: I will allow that.

Mr. Cades: Exception, Your Honor.

Q. You are a certified public accountant, Mr. Tennent? A. Yes.

Q. And have been for many years? A. Yes.

Q. And for many years you have represented various finance and loan companies loaning money in the Territory? A. Yes, sir.

Q. You then are familiar with the laws concerning the interest rates that may be charged in the Territory of Hawaii? A. Yes.

Q. You knew then at the time that letter was written and at the time these loans were made it was a criminal offense for a finance company to loan at a rate of more than one per cent a month?

Mr. Cades: We object.

The Court: I will sustain that objection. That is a conclusion.

Q. And did you ever advise Mr. Carey that the effective rate of his loans were 16 per cent?

A. Very often. In talking over Mr. Carey's affairs with him I pointed out to him that his bor-

(Testimony of Mr. Hugh Copper Tennent.)

rowings from finance companies cost him compared with bank borrowings around that figure as would be borne by his auditor's books but that was, well for that 16 per cent this roughly where that figure comes from. Of course these interest rates if you are trying to pay 16 per cent and the 14, the 14 was on the calculation, you will get a slightly different result. I think I explained it in the testimony. So any time it was put in I would be entitled to digress on the letter, I didn't want any wrong instruction put on it, if I am entitled to it——

The Court: Yes, you can make any explanation you want to.

A. I didn't know that a dispute had arisen between Mr. Carey and the finance company about these rebates and when I found out that a dispute had arisen, I went down after discussing it with Mr. Carey and so on. I went down on my regular visit to Hilo and attempted to arbitrate between the two parties. They were both clients of mine and I wanted to straighten the matter out. The Hilo Finance & Thrift Company for two or three days refused to give these rebates in dispute, but finally the company through their executive, Mr. Hill, said okay, we will give Mr. Carey all the rebates provided Mr. Carey on his part makes a fair contribution or fair settlement towards the dispute, and I thought the matter was settled. So I came back and after discussing it with Mr. Carey or his assistant, these rebates I think that was almost amounting to around \$2000. Mr. Carey could have got those for

(Testimony of Mr. Hugh Copper Tennent.)

payment of around \$500. How the \$500 is referred to is covered in that letter but I said after leaving off so much for the delinquency, that we would consider these roughly as a monthly delinquency and we would consider that portion of the rebate would not be allowed. Mr. Cass, I have in my brief case made a similar proposal—if you would like to have that—by letter to them which he made the same propositions only he used a much higher or different rate of interest.

Mr. Cades: That letter that you refer to has been introduced in evidence. This exhibit Plaintiff's Exhibit K this witness was not present when it was introduced.

A. I was trying various ways of figuring to arrive at a figure that would be or we could settle this matter outside. So what I did was purely a matter of negotiating to try and get a figure of settlement.

Q. Now, Mr. Tennent, these special loans that you have the cards, are those loans made to Carey's Honolulu office, were they not?

A. I am not familiar with all of them but some of them I know were made for machines which came down from the Coast and were routed by Mr. Carey to here. Before he could lift the machines off the wharf—I may be wrong on this—before he lifted them off he had to get the money to get the things.

Q. You picked up the draft and let the machines come through?

A. The others are given for other purposes.

Q. But there are a couple of those loans in there that Mr. Carey endorsed, notes for his employees

(Testimony of Mr. Hugh Copper Tennent.)

and they finally were charged to him. But none of those special accounts had anything to do with the general financing agreement that you had originally to finance the Hilo office, did they? They were aside of the main agreement of financing which we have been going into here in court; they were another transaction. Funds from this may have been used to pay those but as far as the agreement for those notes that was a separate agreement from that of the general financing?

A. Yes, proceeds of those loans sometimes paid these and if possible some of these were borrowed to make up payments on these.

Q. But that list of loans which is a special side agreement is not part of the general picture of those loans?

A. Yes, sir.

Q. These notes that are sued upon have a peculiar clause. Have you ever noticed it; that there is no objection on the part of the Hilo Finance & Thrift Company that they become delinquent the minute a payment is missed? Had you noticed that clause in these notes?

A. I wouldn't be surprised there was a clause in there like that. I can say that but I don't think I have ever seen that. An installment agreement would not have such a clause in it.

Q. It does not have any objection on a default, does it?

A. I don't get your question.

Q. Read the clause referred to. (Reads the clause.)

(Testimony of Mr. Hugh Copper Tennent.)

The Court: No objection in there. That is fine.

Q. Now, in calculating the interest on the notes now before the court, particularly these 8 notes that are embodied in this complaint, did you figure the interest rate on those notes at all?

Mr. Cades: I take it we are back in the case in chief. Do you want to reopen on the case in chief?

The Court: I will let him answer the question.

A. Yes.

Q. Did you take into consideration the fact that that automatic default clause was in those notes?

A. No.

Q. And that the notes bear no interest whatsoever from——

A. What do you mean by the automatic default clause, the one you just read?

Q. The one I just read.

A. I never took that into consideration.

Q. Where there is no objection to a default or no objection to continuing the note, if the default on the part of the payee and the note becomes due at an earlier time than the face of the note by reason of that default, the interest rate for the term is charged, is it not?

A. I think you would have to put a lawyer on the stand.

Mr. Cades: Your Honor, please, that calls for a conclusion of law. (Argument.)

The Court: I will sustain that objection.

(Testimony of Mr. Hugh Copper Tennent.)

Q. But you haven't any idea what the interest on these notes is up the date of default considering that default as being the end of the term of the note?

Mr. Cades: Same objection because the law provides what happens in the event of default. (Argument.)

The Court: I think that is correct, Mr. Cass. I will sustain that objection.

Mr. Cass: That is all, Mr. Tennent.

Mr. Cades: That is all.

The Court: Thank you.

Mr. Cades: Let's see, we were on the defense of the counter-claim. We rest. And now we will renew our motion that the counter-claim be non-suited on the grounds that we have stated it and the situation of the record is this, that there is not only a motion for non-suit to rule on but there is still a motion for a demurrer which still raise the problems of law. (Argument.)

Mr. Cass: The court please, this argument does not concern my conduct in this case or the conduct of my associate. (Argument.)

(Discussions and arguments were had.)

The Court: We will take an adjournment until tomorrow morning at 9 o'clock.

(Arguments were had on the 26th day of June, 1943.)

This Is To Certify the foregoing to be a true and

full transcript of the proceedings had in the above entitled matter before the Honorable Ray J. O'Brien.

/s/ ANNABELLE KEKUNA,
Court Reporter.

[Endorsed]: Filed Third Circuit Court July 10, 1944., W. R. Whittington, assistant clerk.

[Endorsed]: Filed July 21, 1944. Chas. H. K. Holt, clerk Supreme Court.

DEFENDANT'S EXHIBIT 1

\$2,330.00

T. H., April 10, 1934

For Value Received, I promise to pay to the order of Hilo Finance and Thrift Co., Ltd., at its office, the sum of Twenty Three Hundred and Thirty and No/100 Dollars payable in installments and on such dates as indicated in the Schedule endorsed hereon.

And.....also promise to pay to the order ofinterest on the balance for the time being remaining unpaid, at the rate of.....per cent per annum, payable monthly, principal and interest payable net over and above all taxes.

In case of default in any payment of any installment of interest or principal, the entire debt with interest thereon after maturity at 10% per annum, shall immediately become due and payable at the option of the holder thereof. Should any suit for

collection be instituted the undersigned shall also pay the costs of collection including a reasonable attorney's fees.

Secured by collateral agreement and assignment of conditional sale agreement of same date.

/s/ GEO. B. CAREY,
1112 Bethel St.,
Address: Honolulu, T. H.

Installment Note

(Stamped): Hilo Finance & Thrift Co., Ltd.
Paid 7/24/35. By /s/ A. C. White.

Endorsements on Back of Note Dated April 10, 1934

	Due Date	Install. Due		Due Date	Install.. Due
1	5/20/34.....	\$155.32	9	1/20/35.....	\$155.32
2	6/20/34.....	155.32	10	2/20/34.....	155.32
3	7/20/34.....	155.32	11	3/20/35.....	155.32
4	8/20/34.....	155.32	12	4/20/35.....	155.32
5	9/20/34.....	155.32	13	5/20/35.....	155.32
6	10/20/34.....	155.32	14	6/20/35.....	155.32
7	11/20/34.....	155.32	15	7/20/35.....	155.32
8	12/20/34.....	155.32			

Subject to rebate of \$54.36 interest if payments made on due date throughout.

DEFENDANT'S EXHIBIT 1-A

Note No. 6743

Date of Note, 4/10/34. Date of Loan, 4/10/34

Total Loan or face of Note.....		\$2,330.00
Interest deducted in advance.....	\$ 330.00	
Cash received by Defendant.....	1,611.70	
Paid on notes to Realty Investment Co.....	310.64	
Credited to pre-existing notes due to H. F. & T. Co., Ltd.....	77.66	2,330.00

Payments received by Plaintiff:

Date	Amount	
5/12/34.....	\$155.32	
6/16/34.....	155.32	
7/18/34.....	155.32	
8/16/34.....	155.32	
9/22/34.....	155.32	
10/20/34.....	155.32	
11/10/34.....	155.32	
12/18/34.....	155.32	
1/23/35.....	155.32	
2/20/35.....	155.32	
3/22/35.....	155.32	
4/26/35.....	155.32	
5/22/35.....	155.32	
6/15/35.....	155.32	
7/24/35.....	155.32	
7/25/36.....	.20	
		2,330.00

Unpaid Balance of total loan or face
of note.....

2,330.00

Rebate of interest paid to Defendant

7/24/35 54.36

DEFENDANT'S EXHIBIT 2

\$2,330.00

T. H., May 11, 1934.

For Value Received, I promise to pay to the order of Hilo Finance and Thrift Co., Ltd., Hilo Hawaii, at its office, the sum of Twenty Three Hundred Thirty and No/100 Dollars payable in installments and on such dates as indicated in the Schedule endorsed hereon.

And.....also promise to pay to the order ofinterest on the balance for the time being remaining unpaid, at the rate of.....per cent per annum, payable monthly, principal and interest payable net over and above all taxes.

In case of default in any payment of any installment of interest or principal, the entire debt with interest thereon after maturity at 10% per annum, shall immediately become due and payable at the option of the holder thereof. Should any suit for collection be instituted the undersigned shall also pay the costs of collection including a reasonable attorney's fees.

Secured by collateral agreement and assignment of conditional sale agreement of same date.

/s/ GEO. B. CAREY,
1112 Bethel St.,
Address: Honolulu, T. H.

Installment Note

(Stamped): Hilo Finance & Thrift Co.

Paid 8/21/35. By /s/A. C. White.

Endorsements on Back of Note of May 11, 1934

Amount of Note, \$2,330.00

Due		Install.		Due		Install..	
Date		Due		Date		Due	
1	6/20/34.....	\$155.32		8	1/20/35.....	\$155.32	
2	7/20/34.....	155.32		9	2/20/35.....	155.32	
3	8/20/34.....	155.32		10	3/20/35.....	155.32	
4	9/20/34.....	155.32		11	4/20/35.....	155.32	
5	10/20/34.....	155.32		12	5/20/35.....	155.32	
6	11/20/34.....	155.32		13	6/20/35.....	155.32	
7	12/20/34.....	155.32		14	7/20/35.....	155.32	
				15	8/20/35.....	155.32	

Subject to rebate of \$54.36 interest if payments made on due date throughout.

DEFENDANT'S EXHIBIT 2-A

HILO FINANCE & THRIFT CO., LTD.

Note No. 6845

Date of Note, 5/11/34. Date of Loan, 5/12/34

Total Loan or face of Note.....		\$2,330.00
Interest deducted in advance.....	\$ 330.00	
Cash received by Defendant.....	1,456.38	
Paid on notes to Realty Investment Co.....	310.64	
Credited to pre-existing notes		
Due to H. F. & T. Co., Ltd.....	232.98	2,330.00
		<hr/> <hr/>

Payments received by Plaintiff:

Date	Amount	
6/16/34.....	\$155.32	
7/18/34.....	155.32	
8/16/34.....	155.32	
9/22/34.....	155.32	
10/20/34.....	155.32	
11/19/34.....	155.32	
12/18/34.....	155.32	
1/23/35.....	155.32	
2/20/35.....	155.32	
3/22/35.....	155.32	
4/26/35.....	155.32	
5/22/35.....	155.32	
6/15/35.....	155.32	
7/24/35.....	155.32	
8/21/35.....	155.32	
	<hr/>	2,330.00
Unpaid Balance of total loan or face		
of note.....		<hr/>
		2,330.00
		<hr/> <hr/>
Rebate of interest paid to		
Defendant 8/21/35.....		54.36
		<hr/> <hr/>

In the Supreme Court of the Territory of Hawaii

No. 2579

GEORGE B. CAREY,

Petitioner,

vs.

HILO FINANCE & THRIFT CO., LTD.,

Respondent.

STIPULATION

In this cause it is stipulated by and between the parties through their respective counsel for the purpose of abridging the transcript of the record herein on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, that the 32 notes, being Appellant's Exhibits 3 to 34 inclusive, the 4 notes referred to in Appellant's Exhibits 35A, 36A, 37A and 38A and the 8 notes, being Appellee's Exhibits A to H, inclusive, which are identical with the eight notes made Exhibits to the amended complaint are all in the sum of \$2330.00, each except Appellant's Exhibit 34, and the note referred in Appellant's Exhibit 37A, which are in the sum of \$1,165.00, that all notes are dated respectively, as follows: June 14, 1934, July 16, 1934, August 9, 1934, September 18, 1934, October 19, 1934, November 16, 1934, December 17, 1934, January 21, 1935, February 19, 1935, June 12, 1935, July 23, 1935, August 30, 1935, September 20, 1935, October 22, 1935, November 19, 1935, January 28, 1936, February 21, 1936, March 17, 1936, April 24, 1936, May

26, 1936, June 26, 1936, July 27, 1936, August 7, 1936, August 28, 1936, September 29, 1936, October 30, 1936, December 1, 1936, January 7, 1937, February 10, 1937, March 9, 1937, April 9, 1937, April 16, 1937, May 28, 1937, June 29, 1937, July 30, 1937, August 3, 1937, August 31, 1937, September 28, 1937, October 29, 1937, November 17, 1937, November 30, 1937, December 31, 1937, January 31, 1938, February 28, 1938; that all said notes were executed by appellant and made payable to appellee in 15 equal monthly installments, beginning the month the notes were executed or the following month and are on the following form:

Collateral Note

\$2330.00

For value received, I, we, or either of us, jointly and severally promise to pay to the order of Hilo Finance and Thrift Company, Ltd., of Hilo, Hawaii at their office the sum of Twenty Three Hundred Thirty and No/100 Dollars in 15 equal installments of \$155.32 each on the of each month following the date of this note, with interest from maturity at the rate of . . . % per annum until paid with ten per cent additional on amount unpaid, if placed in the hands of an attorney for collection, having deposited with and pledged to said Finance Company, as collateral security for the payment of this note, and all other liabilities of the undersigned to the legal holder hereof, whether direct,

contingent, heretofore or hereafter contracted, the following property, to-wit:

Secured by collateral agreement and assignment of conditional sale agreement of same date.

Default in the payment of any installment hereon shall render the unpaid balance on this note due and payable, and the owner or holder hereof may at any time thereafter sell all or any part of said collateral at public or private sale, with or without notice of the time and place of sale and without notice of the time and place of sale and without demand of performance.

The owner or holder of this note may buy any of said collateral at said sale, and the proceeds of the sale shall be applied first to the payment of expenses of making such sale, including a reasonable attorney fee, if any attorney is employed; second, to the payment of the principal debt hereby secured and the interest thereon after deducting the unearned interest theretofore charged on the unmatured installments; third, to the payment of any other debt which the undersigned may now or hereafter owe the owner or holder of this note, either as principal, co-maker, surety, endorser, or otherwise, and if any surplus remains the same to be paid to the undersigned.

The makers, co-makers, endorsers, sureties or guarantors of this note each for himself, hereby severally agree to pay all costs of collecting or securing, or attempting to collect or secure, this note, including a reasonable attorney fee, whether the same be collected or secured by suit or otherwise, and severally waive demand, presentment,

protest and/or notice of protest, sale, demand or suit, and all other requirements necessary to hold them and agree that time of payment may be extended without notice to them of such extension. The owner or holder of this note is hereby authorized to apply, on or after maturity, to the payment of this note any funds in its possession belonging to the maker, co-maker, surety, endorser, guarantor or any one of them.

It is further stipulated by and between the parties that the words and figures appearing on the back side of each of the eight cards, being Appellee's Exhibit N, are irrelevant and may be omitted from the transcript as directed in the praecipe.

Dated at Honolulu, T. H., this the 31st day of July, 1947.

/s/ BRAHAN HOUSTON,

Attorney for

George B. Carey.

SMITH, WILD, BEEBE

& CADES,

Attorneys for Hilo Finance

and Thrift Company, Ltd.

By /s/ J. RUSSELL CADES.

I do hereby certify that the foregoing is a full, true and correct copy of the original on file in the office of the clerk of the Supreme Court of the Territory of Hawaii.

Dated, at Honolulu, T. H., Aug. 2, 1947.

[Seal] /s/ LEOTI V. KRONE,

Clerk, Supreme Court,

Territory of Hawaii.

APPELLANT'S EXHIBIT 3-A

HILO FINANCE & THRIFT CO., LTD.

Note No. 6962

Date of Note, 6/14/34. Date of Loan, 6/16/34.

Total Loan or face of Note.....		\$2,330.00
Interest deducted in advance.....	\$ 330.00	
Cash received by Defendant.....	1,301.06	
Paid on notes to Realty Investment Co.....	310.64	
Credited to pre-existing notes due to H. F. & T. Co., Ltd.....	388.30	2,330.00
		<hr/>

Payments received by Plaintiff:

Date	Amount	
7/18/34.....	\$155.32	
8/16/34.....	155.32	
9/22/34.....	155.32	
10/20/34.....	155.32	
11/19/34.....	155.32	
12/18/34.....	155.32	
1/23/35.....	155.32	
2/20/35.....	155.32	
3/22/35.....	155.32	
4/26/35.....	155.32	
5/22/35.....	155.32	
6/15/35.....	155.32	
7/24/35.....	155.32	
8/21/35.....	155.32	
9/23/35.....	155.52	
	<hr/>	2,330.00

Unpaid Balance of total loan or face of note	<hr/>
	\$2,330.00
	<hr/>

Rebate of interest paid to Defendant, 9/23/35.....	54.36
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APPELLANT'S EXHIBIT 4-A

HILO FINANCE & THRIFT CO., LTD.

Note No. 7049

Date of Note, 7/18/34. Date of Loan, 7/18/34

Total Loan or face of Note.....		\$2,330.00
Interest deducted in advance.....	\$ 330.00	
Cash received by Defendant.....	1,145.74	
Paid on notes to Realty Investment Co.....	310.64	
Credited to pre-existing notes due to H. F. & T. Co., Ltd.....	543.62	2,330.00

Payments received by Plaintiff:

Date	Amount	
8/16/34.....	\$155.32	
9/22/34.....	155.32	
10/20/34.....	155.32	
11/19/34.....	155.32	
12/18/34.....	155.32	
1/23/35.....	155.32	
2/20/35.....	155.32	
3/22/35.....	155.32	
4/26/35.....	155.32	
5/22/35.....	155.32	
6/15/35.....	155.32	
7/24/35.....	155.32	
8/21/35.....	155.32	
9/23/35.....	155.32	
10/23/35.....	155.52	
		2,330.00

Unpaid Balance of total loan or

face of note.....

2,330.00

Rebate of interest paid to

Defendant, 10/23/35.....

54.36

APPELLANT'S EXHIBIT 5-A

HILO FINANCE & THRIFT CO., LTD.

Note No. 7118

Date of Note, 8/9/34. Date of Loan, 8/16/34.

Total Loan or face of Note.....		\$2,330.00
Interest deducted in advance.....	\$ 330.00	
Cash received by Defendant.....	990.42	
Paid on notes to Realty Investment Co.....	310.64	
Credited to pre-existing notes due to H. F. & T. Co., Ltd.....	698.94	2,330.00
		<hr/> <hr/>

Payments received by Plaintiff:

Date	Amount	
9/22/34.....	\$155.32	
10/28/34.....	155.32	
11/19/34.....	155.32	
12/18/34.....	155.32	
1/23/35.....	155.32	
2/30/35.....	155.32	
3/22/35.....	67.98	
3/28/35.....	68.34	
4/26/35.....	155.32	
5/22/35.....	155.32	
6/15/35.....	155.32	
7/24/35.....	155.32	
8/21/35.....	155.32	
9/23/35.....	155.32	
10/23/35.....	155.32	
11/20/35.....	155.32	
		<hr/>
		2,330.00

Unpaid Balance of total loan or
face of note.....

\$2,330.00

Rebate of interest paid to

Defendant, 11/20/35..... 54.36

APPELLANT'S EXHIBIT 6-A

HILO FINANCE & THRIFT CO., LTD.

Note No. 7252

Date of Note, 9/18/34. Date of Loan, 9/22/34.

Total Loan or face of Note.....		\$2,330.00
Interest deducted in advance.....	\$ 330.00	
Cash received by Defendant.....	835.10	
Paid on notes to Realty Investment Co.....	310.64	
Credited to pre-existing notes due		
to H. F. & T. Co., Ltd.....	854.26	2,330.00
		<hr/> <hr/>

Payments received by Plaintiff:

Date	Amount	
10/20/34.....	\$155.32	
11/19/34.....	155.32	
12/18/34.....	155.32	
1/23/35.....	155.32	
2/20/35.....	155.32	
3/28/35.....	155.32	
4/26/35.....	155.32	
5/22/35.....	67.98	
5/29/35.....	87.34	
6/15/35.....	155.32	
7/24/35.....	155.32	
8/21/35.....	155.32	
9/23/35.....	155.32	
10/23/35.....	155.32	
11/20/35.....	155.32	
12/31/35.....	155.52	
		<hr/>
		2,330.00

Unpaid Balance of total loan or
face of note.....

\$2,330.00

Rebate of interest paid to

Defendant, 12/31/35.....

54.36

APPELLANT'S EXHIBIT 7-A

HILO FINANCE & THRIFT CO., LTD.

Note No. 7339

Date of Note, 10/19/34. Date of Loan, 10/20/34

Total Loan or face of Note.....		\$2,330.00
Interest deducted in advance.....	\$ 330.00	
Cash received by Defendant.....	679.78	
Paid on notes to Realty Investment Co.....	310.64	
Credited to pre-existing notes due to H. F. & T. Co., Ltd.....	1,009.58	2,330.00

Payments received by Plaintiff:

Date	Amount	
11/19/34.....	\$155.32	
12/18/34.....	155.32	
1/23/35.....	155.32	
2/20/35.....	155.32	
3/28/35.....	155.32	
4/26/35.....	155.32	
5/29/35.....	155.32	
6/15/35.....	155.32	
7/24/35.....	155.32	
8/21/35.....	155.32	
9/23/35.....	155.32	
10/23/35.....	155.32	
11/20/35.....	155.32	
12/31/35.....	155.32	
1/28/36.....	155.32	
		2,330.00

Unpaid Balance of total loan or
face of note.....

Rebate of interest paid to

Defendant, 1/28/36..... 54.36

APPELLANT'S EXHIBIT 8-A

HILO FINANCE & THRIFT CO., LTD.

Note No. 7428

Date of Note, 11/16/34. Date of Loan, 11/19/34

Total Loan or face of Note		\$2,330.00
Interest deducted in advance	\$ 330.00	
Cash received by Defendant.....	524.46	
Paid on notes to Realty Investment Co.....	310.64	
Credited to pre-existing notes due to H. F. & T. Co., Ltd.....	1,164.90	2,330.00

Payments received by Plaintiff:

Date	Amount
12/18/34.....	\$155.32
1/23/35.....	155.32
2/20/35.....	155.32
3/28/35.....	155.32
4/26/35.....	77.56
4/30/35.....	77.76
5/29/35.....	155.32
6/15/35.....	155.32
7/24/35.....	155.32
8/21/35.....	155.32
9/23/35.....	155.32
10/23/35.....	155.32
11/20/35.....	155.32
12/31/35.....	155.32
1/28/36.....	155.32
2/24/36.....	155.52

 2,330.00

Unpaid Balance of total loan or
face of note.....

 \$2,330.00

Rebate of interest paid to

Defendant, 2/24/36.....

 54.36

APPELLANT'S EXHIBIT 9-A

HILO FINANCE & THRIFT CO., LTD.

Note No. 7559

Date of Note, 12/17/34. Date of Loan, 12/18/34.

Total Loan or face of Note.....		\$2,330.00
Interest deducted in advance.....	\$ 330.00	
Cash received by Defendant.....	369.14	
Paid on notes to Realty Investment Co.....	310.64	
Credited to pre-existing notes due to H. F. & T. Co., Ltd.....	1,320.22	2,330.00
	<hr/>	<hr/> <hr/>

Payments received by Plaintiff:

Date	Amount	
1/23/35.....	\$155.32	
2/20/35.....	155.32	
3/28/35.....	155.32	
4/30/35.....	155.32	
5/29/35.....	155.32	
6/15/35.....	155.32	
7/24/35.....	155.32	
8/21/35.....	155.32	
9/23/35.....	155.32	
10/23/35.....	155.32	
11/20/35.....	155.32	
12/31/35.....	155.32	
1/28/36.....	155.32	
2/24/36.....	155.32	
3/18/36.....	155.32	
	<hr/>	2,330.00

Unpaid Balance of total loan or
face of note

\$2,330.00

Rebate of interest paid to

Defendant, 2/18/36.....

54.36

APPELLANT'S EXHIBIT 10-A

HILO FINANCE & THRIFT CO., LTD.

Note No. 7657

Date of Note, 1/21/35. Date of Loan, 1/23/35.

Total Loan or face of Note.....		\$2,330.00
Interest deducted in advance.....	\$ 330.00	
Cash received by Defendant.....	213.82	
Paid on notes to Realty Investment Co.....	310.64	
Credited to pre-existing notes due to H. F. & T. Co., Ltd.....	1,475.54	2,330.00

Payments received by Plaintiff:

Date	Amount	
2/20/35.....	\$155.32	
3/28/35.....	155.32	
4/30/35.....	155.32	
5/29/35.....	155.32	
6/15/35.....	155.32	
7/24/35.....	155.32	
8/21/35.....	155.32	
9/23/35.....	155.32	
10/23/35.....	155.32	
11/20/35.....	155.32	
12/31/35.....	155.32	
1/28/36.....	155.32	
2/24/36.....	155.32	
3/18/36.....	155.32	
4/25/36.....	155.52	
		2,330.00
Unpaid Balance of total loan or face of note.....		
		\$2,330.00
Rebate of interest paid to Defendant 4/25/36.....		\$ 54.36

APPELLANT'S EXHIBIT 11-A

HILO FINANCE & THRIFT CO., LTD.

Note No. 7757

Date of Note, 2/19/35. Date of Loan, 2/20/35.

Total Loan or face of Note.....		\$2,330.00
Interest deducted in advance.....	\$ 330.00	
Cash received by Defendant.....	58.40	
Paid on notes to Realty Investment Co.....	310.74	
Credited to pre-existing notes due to H. F. & T. Co., Ltd.....	1,630.86	2,330.00
		<hr/>
		<hr/>
		\$2,330.00

Payments received by Plaintiff:

Date	Amount	
3/28/35.....	\$155.32	
4/30/35.....	155.32	
5/29/35.....	155.32	
6/15/35.....	155.32	
7/24/35.....	155.32	
8/21/35.....	155.32	
9/23/35.....	155.32	
10/23/35.....	155.32	
11/20/35.....	155.32	
12/31/35.....	155.32	
1/28/36.....	155.32	
2/24/36.....	155.32	
3/18/36.....	155.32	
4/25/36.....	155.32	
5/27/36.....	155.32	
	<hr/>	2,330.00

Unpaid Balance of total loan or
face of note.....

\$2,330.00

Rebate of interest paid to
Defendant, 5/27/36.....

\$ 54.36

APPELLANT'S EXHIBIT 12-A

HILO FINANCE & THRIFT CO., LTD.

Note No. 8132

Date of Note, 6/12/35. Date of Loan, 6/15/35.

Total Loan or face of Note.....		\$2,330.00
Interest deducted in advance.....	\$ 330.00	
Cash received by Defendant.....	213.72	
Paid on notes to Realty Investment Co.....		
Credited to pre-existing notes due to H. F. & T. Co., Ltd.....	1,786.28	2,330.00

Payments received by Plaintiff:

Date	Amount
7/24/35.....	\$155.32
8/21/35.....	155.32
9/23/35.....	155.32
10/23/35.....	155.32
11/20/35.....	155.32
12/31/35.....	155.32
1/28/36.....	155.32
2/24/36.....	155.32
3/18/36.....	155.32
4/25/36.....	155.32
5/27/36.....	155.32
6/27/36.....	155.32
7/29/36.....	155.32
8/29/36.....	155.32
9/30/36.....	155.32
9/30/36.....	.20

Unpaid Balance of total loan or face of note.....	2,330.00
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\$2,330.00

Rebate of interest paid to

Defendant, 9/30/36, cash.....

\$ 82.30

By credit on another note.....

\$.20

APPELLANT'S EXHIBIT 13-A

HILO FINANCE & THRIFT CO., LTD.

Note No. 8250

Date of Note, 7/23/35. Date of Loan, 7/24/35.

Total Loan or face of Note.....		\$2,330.00
Interest deducted in advance.....	\$ 330.00	
Cash received by Defendant.....	135.96	
Paid on notes to Realty Investment Co.....		
Credited to pre-existing notes due		
to H. F. & T. Co., Ltd.....	1,864.04	2,330.00
	<hr/>	<hr/>

Payments received by Plaintiff:

Date	Amount	
8/21/35.....	\$155.32	
9/23/35.....	155.32	
10/23/35.....	155.32	
11/20/35.....	155.32	
12/31/35.....	155.32	
1/28/36.....	155.32	
4/25/36.....	155.32	
5/27/36.....	155.32	
6/27/36.....	155.32	
7/29/36.....	155.32	
8/29/36.....	155.32	
9/30/36.....	155.32	
10/31/36.....	155.32	
	<hr/>	2,330.00

Unpaid Balance of total loan or
face of note.....

\$2,330.00

Rebate of interest paid to

Defendant, 8/31/36..... \$ 82.50

APPELLANT'S EXHIBIT 14-A

HILO FINANCE & THRIFT CO., LTD.

Note No. 8332

Date of Note, 8/20/35. Date of Loan, 8/21/35.

Total Loan or face of Note.....		\$2,330.00
Interest deducted in advance.....\$	330.00	
Cash received by Defendant.....	135.96	
Paid on notes to Realty Investment Co.....		
Credited to pre-existing notes due to H. F. & T. Co., Ltd.....	1,864.04	2,330.00

Payments received by Plaintiff:

Date	Amount	
9/23/35.....	\$155.32	
10/23/35.....	155.32	
11/20/35.....	155.32	
12/31/35.....	155.32	
1/28/36.....	155.32	
2/24/36.....	155.32	
3/18/36.....	155.32	
4/25/36.....	155.32	
5/27/36.....	155.32	
6/27/36.....	155.32	
7/29/36.....	155.32	
8/29/36.....	155.32	
9/30/36.....	155.32	
10/31/36.....	155.32	
12/16/36.....	155.52	
		2,330.00
Unpaid Balance of total loan or face of note.....		
		\$2,330.00
Rebate of interest paid to Defendant, 12/16/36		\$ 82.50

APPELLANT'S EXHIBIT 15-A

HILO FINANCE & THRIFT CO., LTD.

Note No. 8443

Date of Note, 9/20/35. Date of Loan, 9/23/35.

Total Loan or face of Note.....		\$2,330.00
Interest deducted in advance.....	\$ 330.00	
Cash received by Defendant.....	135.96	
Paid on notes to Realty Investment Co.....		
Credited to pre-existing notes due		
to H. F. & T. Co., Ltd.....	1,864.04	2,330.00
	<hr/>	<hr/> <hr/>

Payments received by Plaintiff:

Date	Amount	
10/23/35.....	\$155.32	
11/20/35.....	155.32	
12/31/35.....	155.32	
1/28/36.....	155.32	
2/24/36.....	155.32	
3/18/36.....	155.32	
4/25/36.....	155.32	
5/27/36.....	155.32	
6/27/36.....	155.32	
7/29/36.....	155.32	
8/29/36.....	155.32	
9/30/36.....	155.32	
10/31/36.....	155.32	
12/16/36.....	155.32	
1/9/37.....	155.52	
	<hr/>	2,330.00

Unpaid Balance of total loan
of face of note.....

\$2,330.00

Rebate of interest paid to

Defendant, 1/9/37..... \$ 82.50

APPELLANT'S EXHIBIT 16-A

HILO FINANCE & THRIFT CO., LTD.

Note No. 8538

Date of Note, 10/22/35. Date of Loan, 10/23/35

Total Loan or face of Note.....		\$2,330.00
Interest deducted in advance.....	\$ 330.00	
Cash received by Defendant.....	135.96	
Paid on notes to Realty Investment Co.....		
Credited to pre-existing notes due to H. F. & T. Co., Ltd.....	1,864.04	2,330.00

Payments received by Plaintiff:

Date	Amount
11/20/35.....	\$155.32
12/31/35.....	155.32
1/28/36.....	155.32
2/24/36.....	155.32
3/18/36.....	155.32
4/25/36.....	155.32
5/27/36.....	155.32
6/27/36.....	155.32
7/29/36.....	155.32
8/29/36.....	155.32
9/30/36.....	155.32
10/31/36.....	155.32
12/16/36.....	155.32
1/9/37.....	155.32
2/10/37.....	155.52

Unpaid Balance of total loan
or face of note.....

2,330.00

\$2,330.00

Rebate of interest paid to

Defendant, 2/10/37.....

\$ 82.50

APPELLANT'S EXHIBIT 17-A

HILO FINANCE & THRIFT CO., LTD.

Note No. 8267

Date of Note, 11/19/35. Date of Loan, 11/20/35.

Total Loan or face of Note.....		\$2,330.00
Interest deducted in advance.....	\$ 330.00	
Cash received by Defendant.....	135.96	
Paid on notes to Realty Investment Co.....		
Credited to pre-existing notes due to H. F. & T. Co., Ltd.....	1,864.04	2,330.00
	<hr/>	<hr/> <hr/>

Payments received by Plaintiff:

Date	Amount	
12/31/35.....	\$155.32	
1/28/36.....	155.32	
2/24/36.....	155.32	
3/18/36.....	155.32	
4/25/36.....	155.32	
5/27/36.....	155.32	
6/27/36.....	155.32	
7/29/36.....	155.32	
8/29/36.....	155.32	
9/30/36.....	155.32	
10/31/36.....	155.32	
12/16/36.....	155.32	
1/9/37.....	155.32	
2/10/37.....	155.32	
3/10/37.....	155.52	
	<hr/>	2,330.00

Unpaid Balance of total loan or
face of note

\$2,330.00

Rebate on interest paid to

Defendant, 3/10/37..... \$ 82.50

APPELLANT'S EXHIBIT 18-A

HILO FINANCE & THRIFT CO., LTD.

Note No. 8845

Date of Note, 1/28/36. Date of Loan, 1/28/36

Total Loan or face of Note.....		\$2,330.00
Interest deducted in advance.....	\$ 330.00	
Cash received by Defendant.....	291.28	
Paid on notes to Realty Investment Co.....		
Credited to pre-existing notes due		
to H. F. & T Co., Ltd.....	1,708.72	2,330.00

Payments received by Plaintiff:

Date	Amount	
2/24/36.....	155.32	
3/18/36.....	155.32	
4/25/36.....	155.32	
5/27/36.....	155.32	
6/27/36.....	155.32	
7/29/36.....	155.32	
8/29/36.....	155.32	
9/30/36.....	155.32	
10/31/36.....	155.32	
12/16/36.....	155.32	
1/9/37.....	155.32	
3/10/37.....	155.32	
4/12/37.....	155.52	
5/29/37.....	155.32	
		2,330.00
Unpaid Balance of total loan or		
face of note.....		
		\$2,330.00
Rebate of interest paid to		
Defendant, 5/29/37.....		\$ 82.50

APPELLANT'S EXHIBIT 19-A

HILO FINANCE & THRIFT CO., LTD.

Note No. 8926

Date of Note, 2/24/36. Date of Loan, 2/24/36.

Total Loan or face of Note.....		\$2,330.00
Interest deducted in advance.....	\$ 330.00	
Cash received by Defendant.....	291.28	
Paid on notes to Realty Investment Co.....		
Credited to pre-existing notes due to H. F. & T. Co., Ltd.....	1,708.72	2,330.00
	<hr/>	<hr/> <hr/>

Payments received by Plaintiff:

Date	Amount	
3/18/36.....	\$155.32	
4/25/36.....	155.32	
5/27/36.....	155.32	
6/27/36.....	155.32	
7/29/36.....	155.32	
8/29/36.....	155.32	
9/30/36.....	155.32	
10/31/36.....	155.32	
12/16/36.....	155.32	
1/9/37.....	155.32	
2/10/37.....	155.32	
3/10/37.....	155.32	
4/12/37.....	155.32	
5/29/37.....	155.52	
7/1/37.....	155.32	
	<hr/>	2,330.00

Unpaid Balance of total loan or
face of note.....

\$2,330.00

Rebate of interest paid to

Defendant, 7/1/37.....

\$ 82.50

APPELLANT'S EXHIBIT 20-A

HILO FINANCE & THRIFT CO., LTD.

Note No. 9019

Date of Note, 3/17/36. Date of Loan, 3/18/36.

Total Loan or face of Note.....		\$2,330.00
Interest deducted in advance.....	\$ 330.00	
Cash received by Defendant.....	46.88	
Paid on notes of John A. Howard.....	123.00	
John A. Howard, Jr.....	121.40	
Credited to pre-existing notes due		
to H. F. & T Co., Ltd.....	1,708.72	2,330.00

Payments received by Plaintiff:

Date	Amount
4/25/36.....	\$155.32
6/27/36.....	155.32
7/29/36.....	155.32
8/29/36.....	155.32
9/30/36.....	155.32
10/31/36.....	155.32
12/16/36.....	155.32
1/9/37.....	155.32
2/10/37.....	155.32
3/10/37.....	155.32
4/12/37.....	155.32
5/29/37.....	155.32
7/1/37.....	155.32
8/3/37.....	155.52

2,330.00

Unpaid Balance of total loan or
face of note.....

 \$2,330.00

Rebate of interest paid to

Defendant, 8/3/37.....

 \$ 82.50

APPELLANT'S EXHIBIT 21-A

HILO FINANCE & THRIFT CO., LTD.

Note No. 9133

Date of Note, 4/24/36. Date of Loan, 4/25/36.

Total Loan or face of Note.....		\$2,330.00
Interest deducted in advance.....	\$ 330.00	
Cash received by Defendant.....	164.78	
Cash paid on temporary loan.....	126.50	
Paid on notes to Realty Investment Co.....		
Credited to pre-existing notes due to		
H. F. & T. Co., Ltd.....	1,708.72	2,330.00
	<hr/>	<hr/>

Payments received by Plaintiff:

Date	Amount	
5/27/36.....	\$155.32	
2/27/36.....	155.32	
7/29/36.....	155.32	
8/29/36.....	155.32	
9/30/36.....	155.32	
10/31/36.....	155.32	
12/16/36.....	155.32	
1/9/37.....	155.32	
2/10/37.....	155.32	
3/10/37.....	155.32	
4/12/37.....	155.32	
5/29/37.....	155.32	
7/1/37.....	155.32	
8/3/37.....	155.32	
9/1/37.....	155.52	
	<hr/>	2,330.00

Unpaid Balance of total loan or
face of note.....

\$2,330.00

Rebate of interest paid to

Defendant, 9/1/37..... \$ 82.50

APPELLANT'S EXHIBIT 22-A

HILO FINANCE & THRIFT CO., LTD.

Note No. 9222

Date of Note, 5/26/36. Date of Loan, 5/27/36.

Total Loan or face of Note.....		\$2,330.00
Interest deducted in advance.....	\$ 330.00	
Cash received by Defendant.....	291.28	
Paid on notes to Realty Investment Co.....		
Credited to pre-existing notes due to H. F. & T. Co., Ltd.....	1,708.72	2,330.00

Payments received by Plaintiff:

Date	Amount
6/27/36.....	\$155.32
7/29/36.....	155.32
8/29/36.....	155.32
9/30/36.....	155.32
10/31/36.....	155.32
12/16/36.....	155.32
1/9/37.....	155.32
2/10/37.....	155.32
3/10/37.....	155.32
4/12/37.....	155.32
5/29/37.....	155.32
7/1/37.....	155.32
8/3/37.....	155.32
9/1/37.....	155.32
10/10/37.....	155.52

2,330.00

Unpaid Balance of total loan or
face of note

\$2,330.00

Rebate of interest paid

to Defendant, 10/2/37.....

\$ 82.50

APPELLANT'S EXHIBIT 23-A

HILO FINANCE & THRIFT CO., LTD.

Note No. 9353

Date of Note, 6/26/36. Date of Loan, 6/27/36

Total Loan or face of Note.....		\$2,330.00
Interest deducted in advance.....	\$ 330.00	
Cash received by Defendant.....	291.48	
Paid on notes to Reatly Investment Co.....		
Credited to pre-existing notes due to		
H. F. & T. Co., Ltd.....	1,708.52	2,330.00

Payments received by Plaintiff:

Date	Amount	
7/29/36.....	\$155.32	
8/29/36.....	155.32	
9/30/36.....	155.32	
10/31/36.....	155.32	
12/16/36.....	155.32	
1/9/37.....	155.32	
2/10/37.....	155.32	
3/10/37.....	155.32	
4/12/37.....	155.32	
5/29/37.....	155.32	
7/1/37.....	155.32	
8/3/37.....	155.32	
9/1/37.....	155.32	
10/1/37.....	155.32	
11/2/37.....	155.52	
		2,330.00

Unpaid Balance of total loan or
face of note.....

\$2,330.00

Rebate of interest paid to

Defendant, 11/2/37..... \$ 82.50

APPELLANT'S EXHIBIT 24-A

HILO FINANCE & THRIFT CO., LTD.

Note No. 9455

Date of Note, 7/27/36. Date of Loan, 7/29/36

Total Loan or face of Note.....		\$2,330.00
Interest deducted in advance.....	\$ 330.00	
Cash received by Defendant.....	136.16	
Paid on notes to Realty Investment Co.....		
Credited to pre-existing notes due to		
H. F. & T. Co., Ltd.....	1,863.84	2,330.00

Payments received by Plaintiff:

Date	Amount	
8/29/36.....	\$136.16	
9/9/36.....	18.16	
9/30/36.....	20.16	
9/30/36.....	136.16	
10/31/36.....	19.36	
10/31/36.....	135.96	
12/16/36.....	19.36	
12/16/36.....	135.96	
1/9/37.....	155.32	
2/10/37.....	155.32	
3/10/37.....	155.32	
4/12/37.....	155.32	
5/29/37.....	155.32	
7/1/37.....	155.32	
8/3/37.....	155.32	
9/1/37.....	155.32	
10/1/37.....	155.32	
11/2/37.....	155.32	
12/3/37.....	155.52	
		2,330.00
Unpaid Balance of total loan or		
face of note.....		
		<u>\$2,330.00</u>
Rebate of interest paid to		
Defendant, 12/2/37		\$ 82.50

APPELLANT'S EXHIBIT 25-A

HILO FINANCE & THRIFT CO., LTD.

Note No. 9483

Date of Note, 8/7/36. Date of Loan, 8/7/36.

Total Loan or face of Note.....	\$2,330.00
Interest deducted in advance.....	\$ 330.00
Cash received by Defendant.....	2,000.00
Paid on notes to Realty Investment Co.....	
Credited to pre-existing notes due to	
H. F. & T. Co., Ltd.....	2,330.00

Payments received by Plaintiff:

Date	Amount	
9/30/36.....	\$155.32	
10/31/36.....	155.32	
12/16/36.....	155.32	
1/9/37.....	155.32	
2/10/37.....	155.32	
3/10/37.....	155.32	
4/12/37.....	155.32	
5/29/37.....	155.32	
7/1/37.....	155.32	
8/3/37.....	155.32	
9/1/37.....	155.32	
10/1/37.....	155.32	
11/2/37.....	155.32	
12/2/37.....	155.32	
1/4/38.....	155.52	
		2,330.00

Unpaid Balance of total loan or
face of note

\$2,330.00

Rebate of interest paid to

Defendant, 1/4/38..... \$ 82.50

APPELLANT'S EXHIBIT 26-A

HILO FINANCE & THRIFT CO., LTD.

Note No. 9546

Date of Note, 8/28/36. Date of Loan, 8/29/36.

Total Loan or face of Note.....		\$2,330.00
Interest deducted in advance.....	\$ 330.00	
Cash received by Defendant.....		
Paid on notes to Realty Investment Co.....		
Credited to pre-existing notes due to		
H. F. & T. Co., Ltd.....	2,000.00	2,330.00

Payments received by Plaintiff:

Date	Amount	
9/30/36.....	\$155.32	
10/31/36.....	155.32	
12/16/36.....	155.32	
1/9/37.....	155.32	
2/10/37.....	155.32	
3/10/37.....	155.32	
4/12/37.....	155.32	
5/29/37.....	155.32	
7/1/37.....	155.32	
8/3/37.....	155.32	
9/1/37.....	155.32	
10/1/37.....	155.32	
11/2/37.....	155.32	
12/2/37.....	155.32	
1/4/38.....	155.52	
		2,330.00

Unpaid Balance of total loan or
face of note.....

\$2,330.00

Rebate of interest paid to

Defendant, 1/4/38.....

\$ 82.50

APPELLANT'S EXHIBIT 27-A

HILO FINANCE & THRIFT CO., LTD.

Note No. 9621

Date of Note, 9/29/36. Date of Loan, 9/30/36.

Total Loan or face of Note.....		\$2,330.00
Interest deducted in advance.....	\$ 330.00	
Cash Received by Defendant.....		
Paid on notes to Realty Investment Co.....		
Credited to pre-existing notes due to		
H. F. & T. Co., Ltd.....	2,000.00	2,330.00

Payments received by Plaintiff:

Date	Amount	
10/31/36.....	\$155.32	
12/16/36.....	155.32	
1/9/37.....	19.36	
1/9/37.....	135.96	
2/10/37.....	155.32	
3/10/37.....	155.32	
4/12/37.....	155.32	
5/29/37.....	155.32	
7/1/37.....	155.32	
8/3/37.....	155.32	
9/1/37.....	155.32	
10/1/37.....	155.32	
11/2/37.....	155.32	
12/2/37.....	155.32	
1/4/38.....	155.32	
2/2/38.....	155.52	
		2,330.00

Unpaid Balance of total loan
or face of note.....

\$2,330.00

Rebate of interest paid to

Defendant, 2/2/38..... \$ 82.50

APPELLANT'S EXHIBIT 28-A

HILO FINANCE & THRIFT CO., LTD.

Note No. 9706

Date of Note, 10/30/36. Date of Loan, 10/31/36.

Total Loan or face of Note.....		\$2,330.00
Interest deducted in advance.....	\$ 330.00	
Cash received by Defendant.....		
Paid on notes to Realty Investment Co.....		
Credited to pre-existing notes		
due to H. F. & T. Co., Ltd.....	2,000.00	2,330.00
	<hr/>	<hr/>

Payments received by Plaintiff:

Date	Amount	
12/16/36.....	\$155.32	
1/9/37.....	155.32	
2/10/37.....	19.36	
2/10/37.....	135.96	
3/10/37.....	155.32	
4/12/37.....	155.32	
5/29/37.....	155.32	
7/1/37.....	155.32	
8/3/37.....	155.32	
9/1/37.....	155.32	
10/1/37.....	155.32	
11/2/37.....	155.32	
12/2/37.....	155.32	
1/4/38.....	155.32	
2/2/38.....	155.32	
3/8/38.....	155.52	
	<hr/>	2,330.00
Unpaid Balance of total loan or		
face of note.....		
		<hr/>
		\$2,330.00
		<hr/>
Rebate of interest paid to		
Defendant, 3/8/38.....		\$ 82.50
		<hr/>

APPELLANT'S EXHIBIT 29-A

HILO FINANCE & THRIFT CO., LTD.

Note No. 9899

Date of Note, 12/1/36. Date of Loan, 12/16/37.

Total Loan or face of Note.....		\$2,330.00
Interest deducted in advance.....	\$ 330.00	
Cash received by Defendant.....		
Paid on notes to Realty Investment Co.....		
Credited to pre-existing notes due to H. F. & T. Co., Ltd.....	2,000.00	2,330.00

Payments received by Plaintiff:

Date	Amount	
1/9/37.....	\$155.32	
2/10/37.....	155.32	
3/10/37.....	19.32	
3/10/37.....	135.96	
4/12/37.....	155.36	
4/29/37.....	155.32	
7/1/37.....	155.32	
8/3/37.....	155.32	
9/1/37.....	155.32	
10/1/37.....	155.32	
11/2/37.....	155.32	
12/2/37.....	155.32	
1/4/38.....	155.32	
2/2/38.....	155.32	
3/8/38.....	155.32	
4/6/38.....	155.52	
		2,330.00

Unpaid Balance of total loan or
face of note

Rebate of interest paid to

Defendant, 4/6/38..... \$ 82.50

APPELLANT'S EXHIBIT 30-A

HILO FINANCE & THRIFT CO., LTD.

Note No. 9995

Date of Note, 1/7/37. Date of Loan, 1/9/37.

Total Loan or face of Note.....		\$2,330.00
Interest deducted in advance.....	\$ 330.00	
Cash received by Defendant.....		
Paid on notes to Realty Investment Co.....		
Credited to pre-existing notes due to		
H. F. & T. Co., Ltd.....	2,000.00	2,330.00

Payments received by Plaintiff:

Date	Amount	
2/10/37.....	\$155.32	
1/10/37.....	155.32	
4/12/37.....	19.36	
4/12/37.....	135.96	
7/1/37.....	155.32	
8/3/37.....	155.32	
9/1/37.....	155.32	
10/1/37.....	155.32	
11/2/37.....	155.32	
12/2/37.....	155.32	
1/4/38.....	155.32	
2/2/38.....	155.32	
3/8/38.....	155.32	
4/6/38.....	155.32	
5/4/38.....	155.32	
7/14/38.....	155.52	
		2,330.00
Unpaid Balance of total loan or		
face of note.....		
		\$2,330.00
Rebate of interest paid to Defendant.....		

APPELLANT'S EXHIBIT 31-A

HILO FINANCE & THRIFT CO., LTD.

Note No. 114

Date of Note, 2/10/37. Date of Loan, 2/10/37.

Total Loan or face of Note.....		\$2,330.00
Interest deducted in advance.....	\$ 330.00	
Cash received by Defendant		
Paid on notes to Realty Investment Co.....		
Credited to pre-existing notes due to H. F. & T. Co., Ltd.....	2,000.00	2,330.00

Payments received by Plaintiff:

Date	Amount	
3/10/37.....	\$155.32	
4/12/37.....	155.32	
5/29/37.....	155.32	
6/30/37.....	19.16	
7/1/37.....	136.16	
8/3/37.....	155.32	
9/1/37.....	155.32	
10/1/37.....	155.32	
11/2/37.....	155.32	
12/2/37.....	155.32	
1/4/38.....	155.32	
2/2/38.....	155.32	
3/8/38.....	155.32	
4/6/38.....	155.32	
5/4/38.....	155.32	
7/14/38.....	155.32	
		2,330.00

Unpaid Balance of total loan or
face of note

\$2,330.00

Rebate of interest paid to Defendant.....

APPELLANT'S EXHIBIT 32-A

HILO FINANCE & THRIFT CO., LTD.

Note No. 214

Date of Note, 3/10/37. Date of Loan, 3/10/37.

Total Loan or face of Note.....		\$2,330.00
Interest deducted in advance.....	\$ 330.00	
Cash received by Defendant.....		
Paid on notes to Realty Investment Co.....		
Credited to pre-existing notes due to		
H. F. & T. Co., Ltd.....	2,000.00	2,330.00

Payments received by Plaintiff:

Date	Amount
4/12/37.....	\$155.32
5/29/37.....	155.32
6/30/37.....	155.32
8/3/37.....	19.36
8/3/37.....	135.96
9/1/37.....	155.32
10/1/37.....	155.32
11/2/37.....	155.32
12/2/37.....	155.32
1/4/38.....	155.32
2/2/38.....	155.32
3/9/38.....	155.32
6/6/38.....	155.32
5/4/38.....	155.32
7/14/38.....	155.32
8/27/38.....	155.52

2,330.00

Unpaid Balance of total loan or
face of note.....

\$2,330.00

Rebate of interest paid to Defendant.....

APPELLANT'S EXHIBIT 33-A

HILO FINANCE & THRIFT CO., LTD.

Note No. 344

Date of Note, 4/9/37. Date of Loan, 4/12/37.

Total Loan or face of Note.....		\$2,330.00
Interest deducted in advance.....	\$ 330.00	
Cash received by Defendant.....		
Paid on notes to Realty Investment Co.....		
Credited to pre-existing notes due to		
H. F. & T. Co., Ltd.....	2,000.00	2,330.00

Payments received by Plaintiff:

Date	Amount	
5/29/37.....	\$ 19.36	
5/29/37.....	135.96	
6/30/37.....	155.32	
9/1/37.....	19.36	
9/1/37.....	135.96	
10/1/37.....	155.32	
11/2/37.....	155.32	
12/2/37.....	155.32	
1/4/38.....	155.32	
2/2/38.....	155.32	
3/8/38.....	155.32	
4/6/38.....	155.32	
5/4/38.....	155.32	
7/14/38.....	155.32	
8/27/38.....	155.52	
		2,330.00

Unpaid Balance of total loan or		
face of note.....		
		\$2,330.00
Rebate of interest paid to Defendant.....		

APPELLANT'S EXHIBIT 34-A

HILO FINANCE & THRIFT CO., LTD.

Note No. 370

Date of Note, 4/16/37. Date of Loan, 4/17/37.

Total Loan or face of Note.....	\$1,165.00
Interest deducted in advance.....\$	165.00
Cash received by Defendant.....	1,000.00
Paid on notes to Realty Investment Co.....	
Credited to pre-existing notes due to H. F. & T. Co., Ltd.....	1,165.00

Payments received by Plaintiff:

Date	Amount
6/30/37.....	\$155.32
8/3/37.....	77.66
9/1/37.....	77.66
10/1/37.....	77.66
11/2/37.....	77.66
12/2/37.....	77.66
1/4/38.....	77.66
2/2/38.....	77.66
3/8/38.....	77.66
4/6/38.....	77.66
5/4/38.....	77.66
7/14/38.....	77.66
8/27/38.....	77.66
9/28/38.....	77.66
	2,330.00

Unpaid Balance of total loan or
face of note.....

\$2,330.00

Rebate of interest paid to Defendant.....

APPELLANT'S EXHIBIT 35-A

HILO FINANCE & THRIFT CO., LTD.

Note No. 491

Date of Note, 5/28/37. Date of Loan, 5/29/37.

Total Loan or face of Note.....		\$2,330.00
Interest deducted in advance.....	\$ 330.00	
Cash received by Defendant.....		
Paid on notes to Realty Investment Co.....		
Credited to pre-existing notes due to		
H. F. & T. Co., Ltd.....	2,000.00	2,330.00
	<hr/>	<hr/>

Payments received by Plaintiff:

Date	Amount	
6/30/37.....	\$155.32	
8/5/37.....	155.32	
9/1/37.....	155.32	
10/1/37.....	97.02	
10/1/37.....	58.30	
11/2/37.....	155.32	
12/2/37.....	155.32	
1/4/38.....	155.32	
2/2/38.....	155.32	
3/8/38.....	155.32	
4/6/38.....	155.32	
5/4/38.....	155.32	
7/14/38.....	155.32	
8/27/38.....	155.32	
9/28/38.....	155.32	
12/1/38.....	155.52	
	<hr/>	2,330.00

Unpaid Balance of total loan or
face of note.....

\$2,330.00

Rebate of interest paid to Defendant.....

APPELLANT'S EXHIBIT 36

Payments in cash made by the Defendant and applied to notes in evidence and being a part of and included in the payments tabulated in the exhibits attached to each note but not in addition to any of such payments.

Payment made by Check			Total Cash Paid	Total Amount Paid
1935	Mar.	21	\$1,000.00	
	Mar.	27	1019.26	
	Apr.	23	1,397.88	
	Apr.	30	543.72	
	May	21	1,000.00	
	May	27	863.94	
	Dec.	31	1,864.04	\$ 7,688.84
			<hr/>	
1936	Sept.	4	18.16	
	Sept.	29	330.80	
	Oct.	30	330.00	
	Dec.	1	330.00	\$ 1,008.96
			<hr/>	
1937	Jan.	8	330.00	
	Feb.	9	330.00	
	Mar.	9	330.00	
	Apr.	9	330.00	
	May	28	330.00	
	June	29	795.76	
	July	30	562.98	
	Aug.	31	640.64	
	Sept.	28	485.32	
	Sept.	30	155.32	
	Oct.	29	640.64	
	Nov.	30	640.64	
	Dec.	31	795.96	\$ 6,367.26
			<hr/>	
1938				\$11,824.66
				\$26,890.12

R.J.O.B.

APPELLANT'S EXHIBIT 36-A

HILO FINANCE & THRIFT CO., LTD.

Note No. 614

Date of Note, 6/29/37. Date of Loan, 7/1/37.

Total Loan or face of Note.....		\$2,330.00
Interest deducted in advance.....	\$ 330.00	
Cash received by Defendant.....		
Paid on notes to Realty Investment Co.....		
Credited to pre-existing notes due to		
H. F. & T. Co., Ltd.....	2,000.00	2,330.00

Payments received by Plaintiff:

Date	Amount
8/3/37.....	\$155.32
9/1/37.....	155.32
10/1/37.....	155.32
11/2/37.....	97.02
11/2/37.....	58.30
12/2/37.....	155.32
1/4/38.....	155.32
2/2/38.....	155.32
3/8/38.....	155.32
4/6/38.....	155.32
5/4/38.....	155.32
7/14/38.....	155.32
8/27/38.....	155.32
9/28/38.....	155.32
12/1/38.....	155.32
12/1/38.....	155.52

2,330.00

Unpaid Balance of total loan or
face of note.....

\$2,330.00

Rebate of interest paid to Defendant.....

DEFENDANT'S EXHIBIT 37

[Letterhead: Tennent, Greaney & Wallace]

December 26, 1935.

Mr. George B. Carey,
White Sewing Machine Agency,
Honolulu, Hawaii.

Dear Mr. Carey:

I understand that due to Mr. Howard's illness and the fact that some of your Hilo salesmen are in Honolulu over the holidays, sales in Hilo have fallen off the last month or two. I also understand that the situation will be remedied in January when additional salesmen will be sent to Hilo, and the Hilo business pushed forward to make up for the deficiency in sales.

The arrangement with the Hilo Finance & Thrift Co., Ltd., is that you apply Hilo contracts as collateral against your borrowings. The Hilo Finance & Thrift Company is not interested in contracts from other islands, except that they have been willing to oblige you once or twice by accepting two or three of these contracts. However, I am informed that practically all of the contracts that you have sent down to cover the December loan are Honolulu contracts. It is my opinion that you should not have borrowed from Hilo this month, but should have made your payments there by sending over the requisite amount. I must ask you therefore to arrange

to withdraw these contracts within the next few days by repaying off all the Hilo loan, or at least that portion of it which is not covered by Hilo contracts. As a matter for the future, you should not borrow from the Hilo Finance & Thrift Company, Limited in excess of the amount necessary to finance Hilo sales.

I am sending a copy of this letter to the Hilo Finance & Thrift Company, Limited.

Very truly yours,

/s/ H. C. TENNENT.

HCT:H

APPELLANT'S EXHIBIT 37-A

HILO FINANCE & THRIFT CO., LTD.

Note No. 702

Date of Note, 7/30/37. Date of Loan, 7/30/37.

Total Loan or face of Note.....	\$1,165.00
Interest deducted in advance.....\$	165.00
Cash received by Defendant	1,000.00
Paid on notes to Realty Investment Co.....	
Credited to pre-existing notes due to H. F. & T. Co., Ltd.....	1,165.00

Payments received by Plaintiff:

Date	Amount
9/1/37.....	\$ 77.66
10/1/37.....	77.66
11/2/37.....	77.66
12/2/37.....	19.36
12/2/37.....	58.30
1/4/38.....	77.66
2/2/38.....	77.66
3/8/38.....	77.66
4/6/38.....	77.66
5/4/38.....	77.66
7/14/38.....	77.66
8/27/38.....	77.66
9/28/38.....	77.66
12/1/38.....	77.66
12/1/38.....	77.66
12/31/38.....	77.66

1,165.00

Unpaid Balance of total loan or
face of note.....

\$1,165.00

Rebate of interest paid to Defendant.....

DEFENDANT'S EXHIBIT 38

[Letterhead: Hilo Finance & Thrift Co., Ltd.]

September 5, 1936.

White Sewing Machine Agency,
1112 Bethel Street,
Honolulu, T. H.

Gentlemen:

Under date of August 29th we wrote you re shortage of \$19.16 in your payments for the month of August, and also that we had made no deduction on your note of August 7th.

Assuming that you will not be making settlement until the end of the month, we will require a check for \$348.96 in addition to your note for \$2,330.00, or a total of \$2,678.96 made up as follows:

15 Notes at \$155.32.....	\$2,329.80
Short in August payment.....	19.16
Interest & fees.....	330.00
	<hr/>
	\$2,678.96
	<hr/>

Yours very truly,

Hilo Finance & Thrift Co., Ltd.

By /s/ ROBT. S. MOIR,
Accountant.

RSM:RFA

APPELLANT'S EXHIBIT 38-A

HILO FINANCE & THRIFT CO., LTD.

Note No. 712

Date of Note, 8/3/37. Date of Loan, 8/3/37

Total Loan or face of Note.....		\$2,330.00
Interest deducted in advance.....	\$ 330.00	
Cash received by Defendant.....		
Paid on notes to Realty Investment Co.....		
Credited to pre-existing notes due to		
H. F. & T. Co., Ltd.....	2,000.00	2,330.00

Payments received by Plaintiff:

Date	Amount	
9/1/37.....	\$155.32	
10/1/37.....	155.32	
11/2/37.....	155.32	
12/2/37.....	155.32	
1/4/38.....	19.56	
1/4/38.....	135.76	
2/2/38.....	155.32	
3/8/38.....	155.32	
4/6/38.....	155.32	
5/4/38.....	155.32	
7/14/38.....	155.32	
8/27/38.....	155.32	
9/28/38.....	155.32	
9/28/38.....	155.32	
12/1/38.....	155.32	
12/31/38.....	155.32	
12/31/38.....	155.52	
		\$2,330.00
Unpaid Balance of total loan or		
face of note.....		
		\$2,330.00
Rebate of interest paid to Defendant.....		

PLAINTIFF'S EXHIBIT M

In the Circuit Court of the Fourth Judicial Circuit
Territory of Hawaii

L. No. 2316

HILO FINANCE AND THRIFT COMPANY,
LIMITED,

Plaintiff,

vs.

GEORGE B. CAREY,

Defendant,

and

BANK OF HAWAII and BISHOP NATIONAL
BANK OF HAWAII AT HONOLULU,
Garnishees.

DEPOSITION OF WILFORD W. KING

taken on behalf of the plaintiff herein, pursuant to the stipulation for the taking of depositions without commission dated June 1st, 1940, and attached to this deposition, this deposition being taken before Mr. Norman M. Olds, a Clerk of the Circuit Court of the First Judicial Circuit, in the court room of the Fifth Judge of the First Circuit Court, Honolulu, T. H., on Thursday, June 13, 1940, starting at 10 o'clock a.m.,

J. Russell Cades, Esq., of the firm of Messrs. Smith, Wild, Beebe & Cades, appearing at attorney for the plaintiff, and

Plaintiff's Exhibit M—(Continued)
(Deposition of Wilford W. King.)

James M. Richmond, Esq., of the firm of Messrs. Anderson, Marx, Wreen & Jenks, appearing as attorney for the defendant,

Whereupon the following proceedings were had and deposition taken:

Mr. Cades: Before taking the deposition there are some matters that we would like the record to show have been stipulated and agreed to by counsel for the plaintiff and the defendant:

First, that the reporter shall write out the deposition and that the clerk shall attach his certificate thereto, attaching a certified copy of the stipulation for the taking of depositions without commission, which has been furnished to the reporter.

Second, that the parties waive the requirement that the deponent read over and sign the deposition, and,

Third, the parties agree that the deposition may remain open; that is, it is not necessary to seal the deposition and send it to the clerk of court there to be opened by the presiding judge, but the original copy may be presented to counsel for the plaintiff for use in the trial, when and if needed, and further

It is stipulated and agreed that both counsel will state any objection that they have to the form of questions presented, but it is understood that objections going to the materiality or competency of any evidence presented, either on direct or cross-

Plaintiff's Exhibit M—(Continued)
examination, will be presented and may be disposed of at the trial, by the presiding judge.

Mr. Richmond: That is satisfactory, and that is my understanding of the stipulation.

WILFORD W. KING

called as a witness on behalf of the plaintiff, being duly sworn by the Clerk, testified as follows:

Direct Examination

By Mr. Cades:

Q. What is your name?

A. Wilford W. King.

Q. And what is your position?

A. Deputy bank examiner, Territory of Hawaii.

Q. And how long have you occupied that position?
A. Since August 15, 1934.

Q. Continuously during that period?

A. That's right.

Q. Where did you receive your education?

A. In the schools at Salt Lake City, Utah.

Q. Will you state what training you had in the field of accountancy?

A. I have had considerable experience as public accountant; received my certified public accountant's degree in June of 1928 at Salt Lake City, Utah. In 1929 I received a certificate from the Territory of Hawaii by reciprocity.

Q. As a certified public accountant?

A. As a certified public accountant.

Plaintiff's Exhibit M—(Continued)
(Deposition of Wilford W. King.)

Q. How long have you been in private practice as a C.P.A. in the Territory of Hawaii?

A. Eleven years. That is, including all my time. I have been a C.P.A. for eleven years here, but the last six years I have been in the Territorial service.

Q. But for five years before that you were in private practice as a C.P.A.?

A. That's right.

Q. And will you state whether during your incumbency as bank examiner you have had occasion to make a special study of the matter of the regulation of finance companies in the Territory of Hawaii?

A. I have made a very detailed study for two or three years of that subject.

Q. The bank examiner of the Territory of Hawaii is charged with the duty of administering the Money Lender's act, that is the act 154, S. L. 1933, and the Industrial Loan and Investment Act, that is Act 231 S. L. 1937. Will you state who in the bank examiner's office is directly charged with the administration of these two acts?

A. The deputy bank examiner is charged with the administration of those two acts, in this case being myself.

Q. And in the course of your administration of the acts you have the official custody of all of the books and records of the office having to do with the administration of the two acts that I have named?

A. That is true.

Plaintiff's Exhibit M—(Continued)
(Deposition of Wilford W. King.)

Q. I show you here what purports to be a certified copy, being a photostatic copy of the application for—request to operate business of making loans, filed by Hilo Finance and Thrift Company, Limited, on July 20, 1933, and I will ask you whether this is a true copy of an excerpt from the records which are in your official custody?

A. It is.

Mr. Cades: For the record, I understand that counsel will stipulate that it is not necessary to present in this hearing the original application on file in the office, but that the photostatic copy may be used in lieu thereof, is that correct?

Mr. Richmond: That is correct.

Mr. Cades: I will ask that this photostatic copy be attached to the stipulation and deposition, and marked as an exhibit.

(Photostatic copy of document offered is marked by the Clerk: "Plaintiff's Exhibit A," attached to this deposition.)

Q. Then, according to the records, this application of Hilo Finance and Thrift Company, Limited, was filed in the office of the Treasurer of the Territory on July 20th, 1933? A. Yes.

Q. Can you tell me from your records, are you able to tell, whether such a request was granted to the Hilo Finance and Thrift Company, and, if so, when? Will you identify the book from which you are reading?

Plaintiff's Exhibit M—(Continued)
(Deposition of Wilford W. King.)

A. This is a book in which licenses to be issued under the money lender's act to the various applicants are taken. It contains a stub and the license itself. When a license is issued the stub and the license is filled out, and the license detached from the stub. This record shows that on September 22, 1933, license Number 26 was issued to Hilo Finance and Thrift Company, Limited, to conduct a money lender's business at 125 Kamehameha Avenue, Hilo, Hawaii.

Q. Addressing your attention again to the records of your office, I will ask whether your records show whether an application was made by the Hilo Finance and Thrift Company, Limited, for a license to operate as an industrial loan and investment company under the provisions of Act 231, Session Laws of 1937?

A. Yes, the records indicate that a license, or that an application for a license to conduct an industrial loan and investment company business, was dated July 21, 1937, and received August the 2nd, 1937, in the Treasurer's office.

Q. The application was dated when?

A. The application was dated July 21, 1937, and it was received in the Treasurer's office on August the 2nd.

Q. Will you identify the record from which that application appears?

A. That is an application to the Treasurer of the Territory of Hawaii by the Hilo Finance and

Plaintiff's Exhibit M—(Continued)

(Deposition of Wilford W. King.)

Thrift Company, Limited, for a license to conduct an industrial loan and investment company business.

Q. And that record is contained in what, in a file?

A. Oh, is that what you want? Pardon me. This is contained in the file of industrial loan and investment applications, "A" to "I," in the office of the Treasurer of the Territory of Hawaii.

Q. And constitutes part of the official records of that office?

A. It constitutes part of the official records.

Mr. Cades: May it be stipulated that a photostatic copy of this application may be made and attached to this deposition and made a part thereof, and marked as an exhibit?

Mr. Richmond: Yes.

(Photostatic copy of record offered is marked by the Clerk: "Plaintiff's Exhibit B," attached to this deposition.)

Q. And will you state whether the license applied for was in fact granted, and just refer to the thing you are looking at so that it is of record?

A. According to the certificate book, in which is contained the licenses issued under the industrial loan and investment act, on August 2, 1937, license number 31 was granted the Hilo Finance and Thrift Company, Limited, to conduct an industrial loan and investment business at 196 Kamehameha Avenue, Hilo, Hawaii.

Plaintiff's Exhibit M—(Continued)
(Deposition of Wilford W. King.)

Q. Now referring to the application for a license to operate a loan business, that is the 1933 license, under the statute, and under the requirements of your department, the applicant was required to disclose the charges that would be made for different classes of loans, is that correct?

A. That is correct.

Q. And I call specifically your attention to the portion of the application of the Hilo Finance and Thrift Company which reads as follows: "Interest of one per cent per month is charged on loans. For instance, on a one hundred dollar loan interest of ten dollars is deducted when the loan is made and the borrower receives ninety dollars. A one hundred dollar note is payable in ten monthly installments. As an incentive to pay on time a refund of 2.2 per cent is given on the actual money borrowed on all loans paid on time." I will ask you whether substantially all of the applications that were made to your department for the issuance of money lender's permits did or did not contain substantially similar charges for the making of loans?

A. They practically all did.

Q. Now looking again to the records of your office, will you state for the record approximately how many licenses were issued under the 1933 act?

A. Eighty.

Q. Eighty licenses were issued?

A. Yes, that's right.

Q. When it came to making applications under

Plaintiff's Exhibit M—(Continued)

(Deposition of Wilford W. King.)

the 1937 act were the applicants required, either by law or by the regulations of your department, to disclose the rates that they were going to charge?

A. No, the rates were set forth in the law, under the 1937 act.

Q. And your department did not require the filing of statements of rate charges in the application?

A. There is no request for a statement of rates in the application under the 1937 act.

Q. Will you state whether or not substantially all of the licensees under the 1933 act applied for and received licenses under the 1937 act?

A. Most of them did; some did not.

Q. Most of them did, some did not, and the few that did not retired from business?

A. That's right.

Q. Now in regards to these acts, in accordance with the requirements of the 1933 act and the 1937 act, will you state whether your department did, in fact, make periodic investigations of the licensees to ascertain whether they were complying with the law?

A. We did, under both acts.

Q. Under both acts? A. Yes.

Q. Were those examinations made regularly?

A. Well, under the statute—I might explain it this way: Under the statute we were required to make them at least once a year. However, with the small staff we had at the time, or have even now, and the amount of work that we have to do, it has

Plaintiff's Exhibit M—(Continued)

(Deposition of Wilford W. King.)

not permitted us to get around regularly. It may be one year or two years before we get back to the same institutions in the meantime.

Q. Well, do your records show whether investigations were in fact made of the business of the Hilo Finance and Thrift Company during the periods from 1934 to 1938?

A. Our records show that we made an investigation in 1935 and after the one in 1935 we made the next one in 1938, and the next one in 1939.

Q. Do you have the actual time of those investigations there?

A. No, I do not have that. I can get them, however.

Q. Will you state whether you are familiar with the construction of this phrase in the provisions of Section 4, Act 154, Session Laws of 1933, which reads as follows: "And to deduct interest therefor in advance at the rate of one per cent per month or less, and in addition may receive and require uniform weekly or monthly installments?"

A. I am familiar with that.

Q. Will you state whether both from your personal knowledge and your practical knowledge whether that construction was uniform and made public?

A. Our construction was uniform. It was made public to the extent that reports were made to the associations or the licensees examined, of our examination. Our records, as such, are not public documents.

Plaintiff's Exhibit M—(Continued)

(Deposition of Wilford W. King.)

Q. But your construction was made known to any person that was interested in finding out what the construction was? A. That is true.

Q. Will you state what the construction given to those words by your department was?

A. Probably the best way to explain it would be by an example. The law permitted them to deduct interest in advance at the rate of one per cent per month. If an individual went into a licensee and wanted to borrow one hundred dollars, our interpretation was, if you wanted to borrow one hundred dollars for ten months, that the licensee could deduct one per cent of one hundred dollars—or ten per cent of one hundred dollars, being one per cent per month for ten months, or a total of ten per cent, and being deducted in advance, and the borrower would receive ninety dollars.

Q. And then the borrower would pay back?

A. That's true.

Q. At what rate?

A. The law permitted uniform weekly or monthly installments, so that the installments paid back would have to be equal in amounts. In the case that I mentioned the payments would be ten dollars per month to be returned.

Q. And will you state whether the interpretation given by your department was the same under the 1937 act as under the 1933 act?

A. Exactly the same.

Plaintiff's Exhibit M—(Continued)
(Deposition of Wilford W. King.)

Q. And that construction by your department was likewise consistent at all times?

A. It has been consistent during my time there.

Q. And made public to the same extent as your construction of the 1933 act?

A. Yes, that is correct.

Q. Well, may I ask you, under the administrative construction of the act, as applied by your department, what would be the permitted charges in the following case: A borrower requests a loan of \$2,330, out of which he agrees to pay the lender interest at the maximum rate allowed by the statute, in advance. The loan is to be for a period of fifteen months. Would you state what was the maximum amount that could be deducted from that loan?

A. Fifteen per cent of the loan.

Q. Fifteen per cent of \$2,330?

A. Yes, \$349.50.

Q. That is, under the administrative construction of the act a licensee was permitted to deduct \$349.50 from the face amount of that note and pay to the borrower what amount?

A. Pay \$1,980.50

Q. And then in addition thereto, under your administrative construction, the operator would be required to repay the \$2320 note in fifteen equal installments?

A. That is correct.

Q. Monthly?

A. That's right.

Q. At the time that the 1937 act, and whenever I refer to the 1937 act I mean act 231 of the Session Laws of 1937, being the industrial loan and

Plaintiff's Exhibit M—(Continued)

(Deposition of Wilford W. King.)

investment act, was being considered by the legislature of the Territory of Hawaii, will you state whether or not substantially all of the licensees under the 1933 act were in fact making charges in the manner that you have outlined as being the construction of the statute by your department?

A. There were very, very few, a matter of five or six, who were not making such charges.

Q. What was the construction of your department with regard to loans that exceeded eighteen or twenty months, the periodic installments to be paid?

A. Well, from my research on the mainland for over a couple of years, I learned that most laws limited the length of time a loan may be made for to between fifteen months and twenty-four months, and that the average was around eighteen months. We took the position of advising lenders that it was not the intent of the law to permit them to make a loan for many years and deduct the interest in advance, but it had to be or should be kept within a range of between eighteen months and two years.

A. And did you embody that in a regulation of your department, or was that merely suggestive?

A. That was merely suggestive.

Q. You did, however, have strict regulations about the installments being equal?

A. That's right. One of the points that we al-

Plaintiff's Exhibit M—(Continued)

(Deposition of Wilford W. King.)

ways looked for in our examinations was what we call balloon payments. That is to say, a loan was made for, say, six months; a loan was made for six months. However, the payments for the first five months were, say, fifty dollars, and the last payment would be, say, \$300. We call that \$300, payment a balloon payment, and it was used by unscrupulous money lenders to force the borrower to renew and thereby get additional charges where there is an investigation fee permitted, so that we, under the 1933 act, as well as under the present act, watch out for balloon payments, and require uniform payments.

Q. Now during the period from 1933 to 1937 considerable data was compiled by your office with regard to the condition of financial institutions in the Territory of Hawaii, isn't that correct?

A. That is correct.

Q. And will you state, in your own words, what was done by your department with reference to bringing before the Legislature of the Territory of Hawaii in 1937 the data concerning the condition of the financial institutions, and particularly finance companies?

A. We studied for about two years the money lenders' situation in the Islands, as it compared with the laws and regulations in effect in other jurisdictions throughout the United States. During that time, or at least on two occasions, I attended national conventions of the national con-

Plaintiff's Exhibit M—(Continued)

(Deposition of Wilford W. King.)

ferences of Small Loan Supervisors, which is a national association of all state supervisors of small loan and finance companies. At those conventions all matters in regard to interest, and the methods of computing and so forth, are always discussed at some length. I remember distinctly of going to Indiana, where they have a very up-to-date finance company law; Wisconsin, Minnesota, Massachusetts, New York, Virginia, and other states, where I had definite, direct contact with the commissioners involved on the operations of the laws and the pitfalls in the laws, and the ways that money lenders get around the laws, and I had extensive discussions, and received a very great help from the Russell Sage Foundation, Mr. Ralph Nugent, director of the department of remedial laws, whose department had to do with the study of making loans, and costs and interest charges involved, throughout the United States, for a number of years. I came back and drafted in 1936 a proposed industrial loan investment act, patterned a good deal after the Indiana law. After being put into legal form by the attorney general it was presented as an administration bill to the 1937 legislature.

Q. Can you state of your own knowledge whether at the time of the consideration of the 1937 statute the Legislature,—the legislative committee of the Legislature, had before them complete data as to the manner in which the different existing licensees were conducting their business?

Plaintiff's Exhibit M—(Continued)
(Deposition of Wilford W. King.)

A. They did. Prior to the Legislature meeting, Mr. McGonagle and myself took up a campaign to correct the situation, and we both gave a talk at the Rotary Club one day in which we outlined the rates of charge which had been charged under the 1933 act; it ranged all the way from forty per cent a year up to as high as 1200 per cent a year, the actual effective rate of interest, based on the loans made and the length of time the person, or the operators, had the money. We gave that information in the exact form that we had given it to the Rotary Club, to the legislative committees involved.

Q. Will you identify Mr. McGonagle?

A. Mr. McGonagle is treasurer of the Territory, and Bank Examiner ex-officio.

Q. Now in presenting the matter to the Legislature, was it the recommendation of your department that a definite limitation be put on the number of months?

Mr. Richmond: I think I will object to that as being leading.

Mr. Cades: I will withdraw that.

Q. Will you state whether or not your department made recommendations to the legislative committees with reference to the number of months for loans made by finance companies?

A. I don't recall at this time whether we did or not. However, I might say this, we, at the same time as we presented to the legislature an industrial

Plaintiff's Exhibit M—(Continued)

(Deposition of Wilford W. King.)

loan act, we presented a small loan act, and in that act there is a restriction that no contract for loans shall be entered into for a period of longer than twenty months. I have in mind that we did recommend it, but it was not accepted.

Q. Would you mind clarifying, for the purposes of the record, that statement you made about the high effective rates under the existing law? What was the attitude of your department about those high effective rates?

A. Well, under the 1933 act the law permitted one per cent a month in advance, and in addition provided that the licensee could charge for a loan made pursuant to this section a fee of two dollars or less on loans under one hundred dollars. With the applications for licenses under the money lenders' act of 1933, the proposed licensees were required to file a chart of their charges, in addition to the interest rate they were to charge, and they were permitted to charge up to two dollars on one hundred dollars. We found that they were making loans, say, for ten dollars to an individual, for two or three days, and charging him a two dollar fee. He would come back to pay it, and a couple of days later get another ten dollar loan, and they would charge him, again, another two dollars for the fee, and he would come back in time and pay that and get another loan, so that in a month they could get large amounts of money for the use of a small amount of money, so that taking those

Plaintiff's Exhibit M—(Continued)

(Deposition of Wilford W. King.)

amounts which it actually cost the borrowers, the interest charged and the investigation fee, and computing that to an effective rate of interest, based on the amount of money used and the time involved, the rates ran from forty per cent up to 1200 per cent.

Let me say this, in addition, that a good many of the licensees did not charge interest. A good many stated in their charts that they did not charge interest for loans under fifteen days. That was only a catch-all. If the people made a loan over fifteen days they could charge them an investigation fee, and would not have to worry about the interest.

Q. Then the abuses you were referring to, that you were particularly interested in remedying, was the abuse of the fee charged for an investigation for small loans, is that correct?

A. That's true.

Q. And that particular abuse was corrected to your satisfaction, to the satisfaction of your department, by the 1937 statute?

A. That's right.

Q. Now will you state, in your personal knowledge in the field, what the general sources are in the Territory of Hawaii for financial accommodation to business?

A. Well, the financial accommodations are about the same as they are in every other American community, namely, you first have your banks, trust

Plaintiff's Exhibit M—(Continued)

(Deposition of Wilford W. King.)

companies, your building and loan associations, your Morris Plan banks, and finance companies and small loan companies.

(Change in reporters.)

Mr. Cades: May the record show it is stipulated by counsel that the remainder of the deposition may be reported by Mr. Finley, and that he may join in the certificate and likewise counsel waive the requirement of reading the remainder of the deposition and the signature of deponent to the remainder of the deposition?

Mr. Richmond: That is correct.

Q. (By Mr. Cades): State in general what the differences were in the charges made for financial accommodation by the various types of institutions?

A. Banks were charging at that time between 6 and 9 per cent simple interest on reducing balances. Trust companies approximately the same. Building and loan associations were charging from 8 to 10 per cent simple interest on reducing balances. Industrial loan companies were charging 1 per cent per month, deducted in advance plus an investigation fee charge.

That was all the types that we have in the islands under the 1933 act.

Q. That was between 1933 and 1937?

A. That's right.

Plaintiff's Exhibit M—(Continued)
(Deposition of Wilford W. King.)

Q. Then in 1937 a further type of finance institution was created?

A. That's true, that was known as the small-loan act, which covered loans up to \$300 and permitted an interest charge of $3\frac{1}{2}$ per cent per month on the first hundred dollars, $2\frac{1}{2}$ per cent per month on the next \$200, computed on outstanding balances, not deducted in advance.

Q. Can you state from your own knowledge whether or not the practice of deducting interest in advance is a common usage or practice in the business of finance companies?

A. It is definitely a policy, a practice.

Q. The term of deducting interest in advance in the finance-company field has a definite meaning?

A. It has.

Q. Is that meaning the same meaning that was attributed to the words by your department in the construction of the act?

A. It is.

Q. Are you able to state from your knowledge of the finance companies' business whether such companies could continue to exist in the territory of Hawaii with a charge of merely 1 per cent per month on the actual balances outstanding in the hands of the lender?

A. I do not believe that we would have one institution in that business in the territory, which was in the business for profit entirely.

Q. State why that is so?

A. Because the return on invested capital at a

Plaintiff's Exhibit M—(Continued)

(Deposition of Wilford W. King.)

rate that low would be very, very small and would not be attractive to capital. There might be institutions which would continue but they would be in my opinion semi-philanthropic; that is, they were in the business to assist the borrower.

Q. What has been the normal result in other jurisdictions where such institutions have not been able to charge in excess of 12 per cent through interest?

A. Now I don't understand that question. You refer to a rate. The rate you refer to is not a rate in existence in very many jurisdictions.

Q. In your opinion, having in mind the financial needs of the territory of Hawaii, is it an economic necessity that they have finance institutions, the type of which was licensed under the 1933 and 1937 acts?

A. Absolutely an economic need for the community.

Q. Will you state your reasons therefor?

A. My reasons are that the people who apply for assistance at such an institution are the type that do not have a credit standing, permitting them to obtain credit from banks or trust companies or building and loan associations. Therefore they have to go to some place where from the lender's standpoint the risk is a little higher than it would be if they had a credit standing.

A. Just one more question: will you state whether or not your department was instrumental

Plaintiff's Exhibit M—(Continued)

(Deposition of Wilford W. King.)

in having adopted in the 1939 Legislature of the territory of Hawaii an amendment of the industrial loan and investment act for purposes of clarification?

A. Which section do you refer to, Mr. Cades?

Q. I refer particularly to the section of the 1939 act?

Mr. Richmond: I am going to object to that question as leading.

A. 5782 is the section.

Mr. Cades: I will reframe that question:

Q. Referring particularly to the provisions of section 6782-L, as amended by act 75, Session Laws, 1939, state whether your department took any steps in having such legislation adopted by the 1939 Legislature?

A. We sponsored the amendment to the 1939 legislature.

Q. And although this puts a limitation on the number of months for periodic loans, in general the 1939 act continues the construction that was adopted by your department over the period from 1933 to 1939?

A. That is true.

Cross-Examination

By Mr. Richmond:

Q. Mr. King, you stated that your office put a construction on these sections in the 1933 and 1937 acts?

A. That is true.

Q. In placing a construction for administrative

Plaintiff's Exhibit M—(Continued)

(Deposition of Wilford W. King.)

purposes on those statutes, what did you try to do? Did you try to follow out what you thought the Legislature intended?

A. You are referring now to this specific statute?

Q. We can refer first to the 1933 act; I think that is section 7064? A. That's right.

Q. —in the revised laws?

A. Our interpretation was based upon our understanding of the words used or the phrases used in the law as we understood them, and since they were identical phrases or identical with the phrases in other statutes in other jurisdictions and we were familiar with what took place in those jurisdictions, we naturally felt that our interpretation was correct.

Q. As I say, you merely tried to carry out the words of the statute and nothing else?

A. That is true.

Q. Would you say that the purpose of section 7064 is substantially, in your administration you did look at this statute as intending to limit the amount of interest which loan companies might charge? A. That's right, that's right.

Q. What particular reference to the so-called balloon payments, did you have many occasions arise in which there were balloon payments made by—balloon charges, whatever you call them—made by loan companies?

A. I think we run across one or two occasionally, not very many, very seldom.

Plaintiff's Exhibit M—(Continued)
(Deposition of Wilford W. King.)

Q. What did you do when you ran across a case of that sort?

A. We would simply criticize the procedure and refer to the law requiring uniform payments and see that they in the future corrected the situation; that they didn't make any more of those.

Q. In other words, under your construction of the law, if you had borrowed a hundred dollars, it would be unlawful to pay \$10 say 6 months hence and a hundred dollars at the end of the year—I mean \$90 at the end of the year?

A. It would not be unlawful to pay it, it would be unlawful for the person to receive it, the lender to receive it.

Q. It would be unlawful under this statute, that is your construction?

A. For the lender to require it, yes.

Q. Then you referred sometime ago to the effective rates of interest; you meant did you, the rate of interest on unpaid balances for the length of time the borrower had the money, is that what you mean by an effective rate of interest?

A. That is one way of saying it. The way I like to explain effective rate is the cost of the money borrowed over the length of time the money is held.

Q. Wouldn't it be true that in the case of balloon payment the rate of, effective rate of interest would be actually less than if he made uniform payments? A. That is true.

Plaintiff's Exhibit M—(Continued)

(Deposition of Wilford W. King.)

Q. In your construction of the statute, why would you criticize that when you stated you felt this was to cover the interest rate, did you not?

A. Because we were particularly interested in this recurring investigation fee. The balloon payments were made purposely to get an additional investigation fee, and by getting an additional investigation fee periodically the effective rate of interest might materially go up in spite of that balloon payment. In other words——

Q. Leave that out of it, that isn't part of the question. I am just wondering why in the administration of this act you construed a practice which would result in a lower rate of interest as illegal under this statute. Did you do that?

A. Yes, they had to make them in uniform installments, the payments.

Q. Suppose there were no installments at all, would you have any objection to that, your department have any objection to that?

A. No, if a loan was made for a definite period, say 1 month, 2 months, and no installments, there would be no objection, no.

Q. Yet you distinguish between and your department, your department saw a difference between that situation under this statute and a situation where there were small installments and a large payment at the end?

A. That is true.

Q. You stated that you made investigations of the practices of these companies from time to time,

Plaintiff's Exhibit M—(Continued)
(Deposition of Wilford W. King.)

not every year, not all cases, but just as often as you could, I take it? A. That's right.

Q. Were you ever called upon to prosecute any violations of the act? A. No, I was not.

Q. You didn't discover any violations of the act as you construed it? A. That is true.

Q. What about these balloon payments, you said you found one or two of those?

A. In an examination, if we were able to find infractions of law it doesn't necessarily mean a prosecution of the affair in the courts. We always take the stand that we point out to people under our jurisdiction the violations and insist that they correct them.

Q. Then you did find violations from time to time?

A. We find violations from time to time. I don't recall at the present time any specific instances but I do recall discussing the matter of balloon payments with the various examiners, and instructing them to watch out for that type of thing.

Q. But you didn't find for example, anyone that was charging more than 1 per cent a month, deducted in advance, and requiring uniform weekly installments? A. That's right.

Q. Then how was your construal of the statute made known to various loan companies?

A. By word of mouth mainly, of the examiners.

Q. You told them that was what you would permit?

Plaintiff's Exhibit M—(Continued)

(Deposition of Wilford W. King.)

A. Let me say this, that I wasn't on the job as bank examiner when that law became effective.

Q. Which law do you mean?

A. The 1933 law. Mr. Asch, my predecessor, was the one that instituted that or supervised that act when it first went into effect, and he had set down policies which were as I understand it, practically the same as we carried through. We made no material change in the policies when we took over the reins, as our construction of the law in that respect was apparently the same as Mr. Asch's had been.

Q. Did you ever run across any instances of loan companies stretching their loans out for 3 years or more?

A. Yes, I believe we did find a few cases where they have gone in excess of 2 years.

Q. What did you do in those cases?

A. We protested to them that we thought they were too long; that it wasn't the intent of the law to permit them to go on indefinitely, but there was apparently nothing we could do other than that as the law was silent on the subject.

Q. In other words, did you take the position that a long loan like that was a violation of this section?

A. No, we did not, we thought it was a violation of the intent of the law, but we could get no specific construction of the law which would say that they could not do it, so we could not stop it,

Plaintiff's Exhibit M—(Continued)
(Deposition of Wilford W. King.)

but we did protest the loans being made in excess.

Q. You say you protested, you would have to, as an administrative officer, to quote them upon the law? A. That is true.

Mr. Cades: Object to that as argumentative.

Q. (By Mr. Richmond): Then I take it your construction, your office's construction of the statute is that there was no regulation as to the length of time of loans? A. That is true.

Q. You testified, Mr. King, that it was the normal practice for companies, finance companies in applying for licenses, to make a statement of how they were going to charge interest on loans?

A. Under the 1933 act it was required.

Q. Was required? A. Yes.

Q. By law? A. That is true.

Q. But wasn't required in 1937?

A. That's true.

Q. You say it was the general practice there both times, however, for the companies to make statements anyway, is that correct?

A. You mean under the 1933 act and the 1937 act they made statements to us?

Q. Under the 1933, you testified substantially all of the companies made such statements on their applications? A. Yes.

Q. Now in 1937 it was not required by law. What happened then if anything with respect to that?

A. The applications—with respect to the applications, Mr. Richmond?

Plaintiff's Exhibit M—(Continued)

(Deposition of Wilford W. King.)

Q. Yes? Did the companies make these statements in 1937 with respect to how they were going to charge interest? A. They did not.

Q. Now, Mr. King, on Oct. 21, 1938, the Supreme Court handed down a decision in a case entitled *Helbush v. Mitchell*. A. True.

Q. Are you familiar with that case?

A. I am not familiar, I read the decision, I am not familiar with the facts in the case.

Q. Yes, but you were in the department at the time that decision was handed down; you were then deputy bank examiner?

A. I was deputy bank examiner, I wasn't in the Territory at the time, however, I was on the mainland.

Q. You were on the mainland?

A. That's right.

Q. Do you know of your own knowledge whether the construction of these statutes was changed by your department following that decision?

A. The construction was not changed?

Q. In other words, you have previously testified on direct-examination that your department had construed section 7064 here and similar provisions in the 1937 act to mean that the company could deduct 1 percent 6 months in advance and then require repayment in equay monthly instalments, and if that were done that would not be a violation of the law?

A. Our construction under the 1937 act is the same as under the 1933 act.

Plaintiff's Exhibit M—(Continued)
(Deposition of Wilford W. King.)

Q. Following the decision in *Helbush v. Mitchell*, did your department change its construction?

A. It did not.

Q. In other words, you did not state to any persons whose acts you investigated that if they were charging as they had previously done, they were now violating the law? A. I didn't.

Q. You know all of that of your personal knowledge? A. That's true, yes, sir.

Q. Was there any consideration given by your department to the effect of that decision, do you know that?

A. I read the decision and I do not agree with the method of computing interest in the decision.

Q. You didn't agree with the Supreme Court?

A. I didn't agree with the Supreme Court's method of computing interest. However, I am not acquainted with the facts of the case and do not know on what basis they arrived at a lot of their conclusions, but I do not agree with the method of computing interest.

Q. Did you understand that case to put a different construction on these statutes than your department had previously put?

A. Absolutely not.

Q. You understood it to be the same?

A. Pardon me?

Q. You understood the construction to be the same by the Supreme Court that you had previously adopted in your administrative practice?

A. No, I did not.

Plaintiff's Exhibit M—(Continued)

(Deposition of Wilford W. King.)

Q. You felt it was different?

A. Different, absolutely.

Q. But you did not change it?

A. I did not.

Q. To just recapitulate on one point here, I believe you testified that during your administration of the 1933 and 1937 acts, you didn't run across any violations of these sections?

A. Violation of my interpretation of the sections?

Q. Yes?

A. I don't remember testifying to that effect as definitely. We find violations all the time.

Q. In other words, you found people charging more than—I would like to state now I am not trying to mislead the witness here, I wasn't just sure on that point as to what you testified—were there any cases where more than 1 percent a month was charged?

A. Not to my knowledge.

Q. Not to your knowledge? A. Yes.

Q. Then your construction of the act amounted to stating from time to time to the various companies that they were not violating your construction of it in their present mode of business, is that correct?

A. Let me put the answer this way: that we make reports, written reports to the various licensees, calling their attention to violations of law, but not saying specifically "You have complied with

Plaintiff's Exhibit M—(Continued)

(Deposition of Wilford W. King.)

this law and that law." Our policy is to call attention to violations and not to comment on the laws that are being correctly adhered to.

Q. In that event, when were there to be occasions arise for you to make known your construction of the act?

A. We discussed that on various occasions in connection with the application fees and investigation fees that were permitted. We felt they were being injurious, the way they were being handled was injurious to the people, to the extent excessive charges were being made, and discussed them when we were discussing a loan——

Q. Will you say discussing with whom?

A. Various licensees, for instance I might mention J. P. Medeiros, I remember distinctly he was quite irate on this investigation-fee charge and he came to see me several times and talked on the applicability of the law. I had discussions along that time with several of the licensees.

Q. Then you mean when you were discussing the question—what do you call the 2-dollar fee, what is your name for it?

A. Investigation fee.

Q. When you were discussing the question of the investigation fee with the licensees, you incidentally told them what your construction was of the act?

A. Our construction would come into the discussion, and again when we had occasion to consider balloon payments, uniform payments, it would come

Plaintiff's Exhibit M—(Continued)

(Deposition of Wilford W. King.)

into the discussion again. However, those occasions were not many. As I said before, the policy and interpretation had been set down by my predecessor.

Q. In what form did he set it down?

A. No form whatever; he made examinations and permitted the methods which all of the companies used, deducting 1 percent in advance to continue, with no record in the files that their procedure was not correct.

Q. In other words, you mean your predecessor merely did nothing about the existing conditions, is that what you mean?

A. In effect that would be it.

Q. And in following his lead then you merely did nothing about the situation, is that so?

A. I don't admit that, I didn't follow his lead, I tried to follow the law, and when I first went into the department I studied very thoroughly the laws we had to supervise, and in many ways our interpretation of the statutes are apparently different from those made by Mr. Asch, because we were called by various institutions on our interpretation, and were told Mr. Asch's interpretations were otherwise.

Q. I had reference to your statement that these policies had been set down by Mr. Asch and that you followed them? A. No.

Q. You wish to correct that?

Mr. Cades: I object to the form of that question. I think the question presupposes something that was not in the evidence. The evidence was that on a particular construction of the statute with regard

Plaintiff's Exhibit M—(Continued)
(Deposition of Wilford W. King.)

to charges of interest deducted in advance and periodic payments the construction of their department was consistent and uniform and had been adopted by his predecessor and had not been changed.

He said in other particulars points came up from time to time where the Asch construction was different from their construction, and it has no bearing on the case and presupposes something that has never been testified to and is objected to as to form.

Mr. Richmond: The witness testified on direct examination with respect to the publicity and of the construction made by his department of the statute and with respect to the manner in which it was made known to the moneylending fraternity and to the manner in which it might be available to the public at large.

Mr. Cades: Correct.

Mr. Richmond: My question is a proper question.

Mr. Cades: No, and on cross-examination he further testified that that construction had been already established by his predecessor. He has mentioned other constructions of the act on which he has not been specifically questioned, and I think the present question is unfair to the witness. However, that may be decided by the trial judge.

Mr. Richmond: I will reframe the question:

Q. I am now referring to the construction of your office with respect to the propriety under sec-

Plaintiff's Exhibit M—(Continued)

(Deposition of Wilford W. King.)

tion 7064 and the similar statute in 1937, the propriety of charging 1 percent a month in advance and requiring uniform weekly or monthly payments. I am not referring to any other constructions of any other part of this act, but just to that phraseology as it is affected here.

Now you state that your construction or rather that that construction was started by Mr. Asch?

A. I can't say that construction that I have——

Q. Yes?

A. ——was started by Mr. Asch; I would say that it appears that the construction we have was also held by Mr. Asch, because the records do not indicate that exception was taken to the licensees operating in that manner, and they were all doing it.

Q. Now referring to this matter of construction alone, you know which part of the statute I am referring to. That construction then was made known to the moneylending fraternity how?

A. By my lack of challenging their procedure.

Q. And in any other way?

A. From time to time, as I told you before, in discussions with them in which the investigation fee was involved.

Mr. Richmond: That is all.

Redirect Examination

By Mr. Cades:

Q. Mr. King, you were asked whether it has been made known in any other way. Isn't it a fact

Plaintiff's Exhibit M—(Continued)

(Deposition of Wilford W. King.)

that while you were in the bank examiner's office in 1937, that some 40 industrial-loan and business licenses were issued? A. That is true.

Q. And at the time these licenses were issued, isn't it a fact that your department was fully informed about the rates they were charging?

A. That is true, by our investigations of their companies we knew their procedures.

Q. So that isn't it true that that was a fairly forceful way of making it known to them that your department construed the statute as they had been issuing licenses to them?

Mr. Richmond: I will object to that question.

A. I will answer the question in this way: that by our granting a license we approved the methods that they were using and the charges that they were using.

Q. State of your own knowledge whether the licensees, both under the 1933 act and the 1937 act did or did not rely on these licenses for their ability to make the charges? A. I believe they did.

Q. State whether there are not a substantial number of persons in the territory of Hawaii not engaged in the lending business that do make isolated loans, is that correct or incorrect?

A. Will you read that question, please?

(Last question read as above recorded.)

A. According to information and reports coming to my office occasionally I believe it is correct.

Q. The persons who have applied for and re-

Plaintiff's Exhibit M—(Continued)

(Deposition of Wilford W. King.)

ceived business licenses have transacted a large number of loans, is that correct?

A. Considerable number of loans, that is true.

Q. Have you any idea of the amount of money in the period of a year that has been loaned by finance companies in reliance on licenses granted under the 1933 act and 1937 act?

A. I have computations in my office under the 1937 act, I don't believe I have under the 1933 act.

Q. Could you give some approximation of what they were, from memory?

A. I can state this: according to the annual reports during the last couple of years, the total assets, the very largest part of which are loans and installment contracts, and so forth, have been in excess of 6 millions of dollars.

Q. In excess of 6 millions of dollars, and you consider and can say that of your knowledge a substantial majority of those loans are or are not in excess of 12 percent computed on the outstanding balances?

A. I don't understand that question.

Mr. Cades: Would you mind reading it to see if it is clear?

(Last question read as above recorded.)

The Witness: I am still confused with that question.

Mr. Cades: I will reframe the question:

Q. Can you state of your own knowledge whether or not a substantial majority of the loans bear interest in excess of 1 percent per month on the out-

Plaintiff's Exhibit M—(Continued)

(Deposition of Wilford W. King.)

standing balances due from the borrower to the lender?

A. I would say in excess of 90 percent are made on that basis.

Q. So that if the construction of your department, continued over a period of some 6 years, were to be determined to be improper, perhaps 90 percent of the loans of licensees under the moneylenders act, and licensees under the industrial-loan and investment act, would be usurious?

A. That is true.

LCF-1940-314-46.

/s/ WILFORD W. KING,

Subscribed and sworn to before me, this 19 day of June, A. D. 1940.

/s/ M. NORMAN OLDS,

Clerk, Circuit Court, First Judicial Circuit, Territory of Hawaii.

I, M. N. Olds, one of the Clerks of the Circuit Court, First Judicial Circuit, Territory of Hawaii, residing in Honolulu, do hereby certify that heretofore, to wit, on the 13th day of June, A.D. 1940, personally appeared before me, at the Judicial Bldg., in the City of Honolulu, Territory of Hawaii, Wilford W. King, a witness produced on behalf of plaintiff in a certain cause now pending and undetermined in the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii, wherein Hilo Finance & Thrift Co., Ltd., is plaintiff, George B. Carey, is defendant and Bank of Hawaii and Bishop

Plaintiff's Exhibit M—(Continued)

(Deposition of Wilford W. King.)

National Bank of Hawaii at Honolulu are garnishees.

I Further certify that the said witness, Wilford W. King, was by me first duly sworn to testify the truth, the whole truth and nothing but the truth in the cause aforesaid; that the testimony then given by him was in my presence reduced to writing, in the presence of the said witness by means of shorthand and afterwards transcribed upon a typewriter, and the foregoing is a true and correct transcript of the testimony so given by him as aforesaid.

I further certify that after said testimony had been so transcribed it was read over by the said witness who then and there did subscribe and again make oath to the same.

I further certify that the taking of this deposition was in pursuance of stipulation hereto attached; and that there were present at the taking of this deposition Mr. J. Russell Cades for plaintiff and Mr. James M. Richmond for defendant.

I further certify that I am not counsel for nor in any way related to any of the parties to this suit nor am I any way interested in the outcome thereof.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, this 19th day of June, A.D. 1940.

/s/ M. NORMAN OLDS,

Clerk, Circuit Court, First Judicial Circuit, Territory of Hawaii.

[Endorsed]: Received and filed in the Supreme Court July 21, 1944. Chas. H. K. Holt, clerk.

[Title of Court and Cause Omitted.]

DECISION

Carlsmith & Carlsmith, Esquire, R. Cades, Esquire, Attorneys for Plaintiff.

W. C. Moore, Esquire, Cass & Silver, Esquire, Attorneys for Defendant.

On June 3, 1939, the plaintiff above named, instituted an action against the defendant to recover the sum of Five Thousand Four Hundred and Sixty-eight Dollars and Seventy-seven cents (\$5,468.77), together with interest, costs and attorneys' fees.

The complaint contained eight counts and alleged that the defendant, made, executed and delivered eight promissory notes to the plaintiff, each in the sum of twenty-three hundred and thirty (\$2330) Dollars. Copies of each note were attached to the complaint and made a part thereof. The complaint alleged that various sums were paid on account of the notes. These amounts are recorded on each of the attached copies of the notes. The amount sought to be recovered represents the total unpaid balance on each note, together with interest.

On June 24, 1939, the defendant filed a general denial to plaintiff's complaint and in addition thereto pleaded a set-off and counter-claim containing thirty-eight counts. The defendant's set-off and counter-claim alleged that during the period from April 10, 1934, to July 30, 1937, the defendant made, executed and delivered to plaintiff 38 promissory notes, 36 for the sum of \$2330, and the remain-

ing two for the sum of \$1155.00. The set-off and counter-claim alleges that each of the aforesaid notes were the result of an illegal and corrupt agreement whereby the plaintiff for the purpose of receiving a greater sum for the loan of its money than at the rate of one per cent per month, agreed to loan the defendant \$2000 for the period of fifteen months and defendant in consideration thereof delivered 35 notes for the sum of \$2350, payable in fifteen months. It further alleged that plaintiff loaned defendant an additional \$2000 and in consideration thereof, the defendant executed and delivered to the defendant the two notes for the sum of \$2350.

The defendant alleged that he paid plaintiff the sum of \$4564.44 in excess of one per cent per month on the notes referred to in the set-off and counter-claim and prayed this amount be set off against any judgment rendered for the plaintiff.

On July 11, 1939, the plaintiff filed a general denial to defendant's answer of set-off and counter-claim.

On June 21, 1943, plaintiff filed an amended declaration.

On June 22, 1943, the plaintiff amended his amended complaint of June 21, 1943, alleging that the plaintiff and defendant understood and agreed that the monthly installments would be due on the same day in each month that the advance was made. Plaintiff added eight counts to the declaration for the balance due on each of the notes for money had and received and prayed for judgment in the sum of \$4971.64.

On June 22, 1943, the defendant filed a demurrer to the amended complaint. The demurrer was overruled on June 23, 1943.

On June 23, 1943, the defendant filed a general denial to plaintiff's complaint and set up a counter-claim and set-off and prayed for judgment in the sum of \$7,188.28.

On June 23, 1943, the plaintiff filed a demurrer to defendant's set-off and counter-claim. The demurrer was sustained on June 23, 1943.

On June 24, 1943, the defendant filed an amended answer of general denial to plaintiff's amended declaration and pleaded a set-off and counter-claim and in support thereof alleged that on November 21, 1933, defendant entered into an oral financing agreement with plaintiff whereby plaintiff agreed to loan money on an open account on certain collateral security as needed by the defendant, the loans, as made, to be endorsed by promissory notes in the form attached as exhibits to the amended declaration; that about April 18, 1934, and thereafter, defendant did continuously borrow and replay loans to plaintiff upon an open account and executed notes for said sums so borrowed to a total of \$104,850.00 face value of notes executed for a total amount of cash received in the sum of \$17,973.32; that upon all loans so made there was charged by plaintiff against the defendant interest at a rate greater than two per cent per month which was included in the face value of each note so

executed; that defendant repaid plaintiff the entire principal sum of said loans on or before December 30, 1938, by paying plaintiff the total sum of \$23,161.94, of which sum \$6,188.62 was paid on the usurious interest charged.

The defendant gave notice that he would rely on the defenses of payment, lack of consideration, usury, illegality and fraud, and prayed for judgment of the sum of \$6,188.62, together with interest, costs and attorneys fees.

On June 24, 1943, the plaintiff filed a demurrer to defendant's amended answer upon the grounds: (1) That all sums of moneys demanded therein have been voluntarily paid by the defendant; (2) That a portion of the claim therein alleged is barred by the Statute of Limitations and; (3) That it affirmatively appears from the amended set-off and counter-claim that if defendant had any claim against the plaintiff, that the same is generally barred and is uncollectible under the Provisions of Act 75 of the Session Laws of 1939.

On June 26, 1943, the plaintiff filed an answer to defendant's set-off and counter-claim denying all the allegations therein and gave notice that it would rely on the defense of illegality, payment, statute of limitations and the provisions of Act 75 of the Session Laws of Hawaii 1939.

The plaintiff's evidence established that the defendant executed and delivered to the plaintiff the promissory notes described in the complaint. The amount remaining unpaid on the notes is undis-

puted. It is also admitted that the sum of \$330.00 was deducted from the principal of each note on account of interest at the time the loan was made.

The defendant contends that under the terms of the notes in question, the parties having contracted for a greater rate of interest than one per cent per month, the notes are therefore within the prohibition against usuary contained in Section 7055 Revised Laws of Hawaii 1935, as amended by Act 222 of the Session Laws of 1937 and therefore void.

In the case of *Henry W. Helbush v. Mitchell, Jr. et al*, 34 Hawaii 639, our Supreme Court held that where a contract requires the payment of an indebtedness with interest in equal periodic installments, each installment in the absence of language of the contrary is applicable, first to the satisfaction of all interest due, and if a surplus exists after such principal and the interest for the succeeding period is computable upon the balance of principal remaining after the application of the preceding installment.

In applying the foregoing rule to the notes in the case at bar, the effective rate of interest charged is in excess of two percent per month. This result is based upon the following figures:

If interest has been charged at the rate of one percent per month:

<u>MONTH</u>	<u>PRINCIPAL PAYMENT</u>	<u>UNPAID TRUE PRINCIPAL</u>	<u>INTEREST at 1%</u> <u>MONTHLY ON UNPAID</u> <u>TRUE PRINCIPAL.</u>
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5.32 Prin.	x 15 payments =	\$1999.80	\$330.00 Interest
2.00 Int.	x 15 payments =	330.00	-160.01
	TOTAL.....	\$2329.80	169.99 Excess



It follows that in accordance with the rule laid down in *Helbush v. Mitchell* above, the effective rate of interest charged in the notes under consideration is in the sum of 24.75 per cent per annum.

Subsequent to the decision in *Helbush v. Mitchell*, Act 75 of the Session Laws of Hawaii 1939, known as Industrial Loan Act, became law. Under this Act interest is chargeable and deductible from principal and calculated on the principal maximum of one per cent per month on total principal disregarding diminishing balance. It would be lawful under the provisions of this act to charge interest at the rate of \$23.30 per month on the notes in the case at bar. This would represent interest in the sum of \$349.50, while the actual charge on the notes in the case at bar is \$330.00. If calculated on the bases of the *Helbush* decision, this would amount to over twenty-six per cent per annum.

It is admitted that the plaintiff was duly licensed under Act 154 of the Session Laws of Hawaii 1933 and under Act 231 Series D-140 Session Laws of Hawaii, 1937, at the time the notes were executed.

The Industrial Loan Act in addition to setting out the method of calculating interest by licensees, repeals the defense of usury provided by Chapter 232 and particularly by Section 7053 of the Revised Laws of Hawaii 1935.

Section 2 of Section 6782X of the Industrial Loan Act provides as follows:

“Section 2. In so far as, and to the extent that, it lies within the power of the legislature

so to enact, it is hereby provided that the defense of usury provided by Chapter 232, and particularly by section 7053, of the Revised Laws of Hawaii 1935, shall not be available to any party in any action brought upon or arising out of any note or other contract to pay or secure the payment of money heretofore made or executed to any person, firm, association or corporation as the payee or obligee of such note or contract, which payee or obligee was duly licensed under Act 154 of the Session Laws of Hawaii 1933, or under Act 231, Series D-140, of the Session Laws of Hawaii 1937, at the time of the making of such note or other contract, if such note or contract provides for, and there has been collected thereon by such payee or obligee or the holder thereof no greater rate or amount of interest or other charges or both, than those that would have been permitted under this Act if it had been in force when such note or contract was made."

The defendant contends that the Legislature was without authority to repeal the defense of usury which existed at the time the notes in the case at bar were executed. This contention cannot be upheld.

Clear authority holds that the repeal of usury laws, without a saving clause operates retrospectively so as to cut off the defense for the future, even in actions upon contracts previously made.

In 6 R. C. L. 351, the following appears:

“It is now generally recognized that the Legislature may repeal a usury law, and that no one has any vested right to take advantage of such laws, nor does their repeal operate as an impairment of the obligation of contracts. Independent of the nature of the forfeiture as a penalty, which is taken away by a repeal of such a statute, the more general and deeper principle on which they are to be supported is, that the right of a defendant to avoid his contract is given to him by statute, for the purpose of its own, and not because it affects the merits of his obligations; and that, whatever the statute gives, under such circumstances, as long as it remains in fieri, and not realized, by having passed into a completed transaction, may by a subsequent statute be taken away. It is a privilege that belongs to the remedy, and forms no element in the right that inheres in the contract.”

In *Patterson v. Berry*, 125 Fed., p. 902, at p. 905, the Circuit Court of Appeals of the Ninth Circuit, uses the following language:

“It is well settled that the defense of usury, either to the principal of a contract debt or to the interest thereon, is in the nature of a penalty or forfeiture, which may be taken away by legislation, both as respects previous as well as subsequent contracts. This is sufficiently shown by the case of *Ewell v. Daggs*, 103, U. S. 143, 2 Sup. Ct. 408, 27 L. Ed. 682, but we add other references.”

In *Coe v. Muller*, 77 So. p. 88, at p. 90, the Supreme Court of Florida said:

“Usury being merely a statutory defense, not founded upon any common-law right, either legal or equitable, it is clearly within the power of the Legislature to take it away.”

In *Curtis v. Leavitt*, 15 N. Y. 9 Text 229, Mr. Justice Page said:

“The defense of usury is in the nature of a penalty or forfeiture and may at any time be taken away by the Legislature in respect to previous as well as subsequent contracts without treading upon any vested right.”

In *Jefferson Life Insurance Company, et al, v. Dattel*, the Circuit Court of Appeals of the Fifth Circuit (1936) said:

“A defense of or a forfeiture because of usury is not a vested right so long as it has not been established by judgment; so that usury laws can constitutionally be altered retroactively.”

In *Welch v. Wadsworth* (1861) 30 Conn. 149, 79 Am. Dec. 236, the Court said:

“Again, the Legislature may repeal a penal statute, and by the fact of repeal, unless there be some saving clause, all penalties fall, even if given to individuals, and suit has been brought and is pending for them. *Butler vs. Palmer* I. Hill, 324, *Smith’s Commentaries on Statutes and Constitutional Law* 892-896. The

parties to usurious contracts hold any right they can be presumed to hold to the penalties given by the law, subject to a modification or repeal by the Legislature which may destroy them and a consequent direct or indirect validation of their contracts.”

In *Ewell v. Daggs*, 108, U. S. p. 143, at p. 150, the Supreme Court of the United States held that a contract which a statute in Texas made void for usury is voidable only and a repeal of the statute that made contracts void, deprives the debtor of the statutory defense of usury.

The Court uses the following language:

“The effect of the usury statute of Texas was to enable the party sued to resist a recovery against him of the interest which he had contracted to pay, and it was, in its nature, a penal statute inflicting upon the lender a loss and forfeiture to that extent. Such has been the general, if not uniform, construction placed upon such statutes. And it has been quite as generally decided that the repeal of such laws, without a saving clause, operated retrospectively, so as to cut off the defense for the future, even in actions upon contracts previously made. And such laws, operating with that effect, have been upheld, as against all objections on the ground that they deprived parties of vested rights, or impaired the obligation of contracts. The very point was so decided in the following cases: *Curtis v. Leavitt*, 15 N. Y. 9;

Savings Bank v. Allen, 28 Conn. 97; Welch v. Wadsworth, 30 Conn. 149; Andrews v. Russell, 7 Blackf. 474; Wood v. Kennedy, 19 Ind. 68; Town of Danville v. Pace, 25 Grat. 1; Parmelee v. Lawrence, 48 Ill. 331; Woodruff v. Scruggs, 27 Ark. 26.

And these decisions rest upon solid ground. Independent of the nature of the forfeiture as a penalty, which is taken away by a repeal of the act, the more general and deeper principle on which they are to be supported is, that the right of a defendant to avoid his contract is given to him by statute, for purposes of its own, and not because it affects the merits of his obligation; and that whatever the statute gives, under such circumstances, as long as it remains in fieri, and not realized by having passed into a completed transaction, may, by a subsequent statute, be taken away. It is a privilege that belong to the remedy, and forms no element in the rights that inhere in the contract. The benefit which he has received as the consideration of the contract, which, contrary to law, he actually made, is just ground for imposing upon him, by subsequent legislation, the liability which he intended to incur. That principle has been repeatedly announced and acted upon by this court. Read v. Platts-mouth, 107 U. S. 568; and see Lewis v. McElvain, 16 Ohio, 347; Johnson v. Bentley, *Ib.* 97; Trustees v. McCaughy, 2 Ohio State, 152;

Satterlee v. Mathewson, 16 S. & R. 169; S. C. in error; 2 Pet. 380; Watson v. Mercer, 8 Pet. 88.

The right which the curative or repealing act takes away in such a case is the right in the party to avoid his contract, a naked legal right which it is usually unjust to insist upon, and which no constitutional provision was ever designed to protect. Cooley Constitutional Limitation, 378, and cases cited."

The next contention of the defendant is that he is entitled to setoff payments made to the plaintiff for interest above the legal rates upon notes that accrued prior to those in the case at bar.

This contention cannot be sustained. In *Carey v. The Discount Corporation*, 36 Haw. 107, our Supreme Court held that usurious interest voluntarily paid constituted a waiver of the defense of usury afforded by the Statute.

In addition to the foregoing authority, Section 7053 of the Revised Laws of Hawaii 1935, which authorizes the defense of usury, has no application to a licensee under the Industrial Loan Act passed by Act 75 of the Session Laws of 1939.

Counsel for the defendant also rely on the case of *Carey v. Discount Corporation*, 36 Haw. p. 107. In that case the court after stating that the Legislature made it clear by the language used in Section 7053, that it intended to save a contract which provided for a greater rate of interest than one per cent per month from being subject to the

general rule that a contract made in violation of a statute is void, contains the following dicta:

“Since it is admitted that the criminal usury statute has no application to the facts of this case, and since the criminal usury statute now prohibits the taking of more than one per cent per month for the loan of money and punishes the taking as a crime, thereby making applicable Section 8, Revised Laws of Hawaii 1935, which provides ‘Whatever is done in contravention of a prohibitory law is void, although the nullity be not formally directed, we have deemed it at least prudent to state that the decision in this case has no application to cases involving loan contracts which come within the prohibition of the criminal statute in force at the time the usurious interest was taken’.”

The Supreme Court of the United States, in *Ewell v. Daggs*, 108, U. S. 143, cited on page 8 of this opinion, had occasion to consider a point analogous to this under investigation. It arose in an action brought on a promissory note, the defense being usury. The Texas statute in force when the note was executed made all contracts in writing stipulating for a greater rate of interest, etc. Thereafter all usury laws were abolished by the Texas Constitution and the Legislature was forbidden from making laws limiting the parties to contract in the amount of interest they may agree upon for loans of money or other property. It was claimed by the appellant that, notwithstanding this

repeal of the usury laws, the rights of the parties are to determine according to the law in force at the time the transaction took place. The argument advanced was that the contract was void as to the entire interest. But it was held that the words "void and of no effect" were used in the sense of voidable "merely, that is, capable of being avoided"—and that they did not mean that the transaction was an absolute nullity, as though it never had existed, not capable of giving rise to any rights or obligations under any circumstances. "All that can be meant by the term," Justice Matthews said, "according to any legal usage, is that a court of law will not lend its aid to enforce the performance of a contract which appears to have been entered into by both the contracting parties for the express purpose of carrying into effect that which is prohibited by the law of the land. Broom's Legal Maxims, 732." The court also recognized the distinction between *mala in se* and *mala prohibita*, saying: "A distinction is made between acts which are *mala in se*, which are generally regarded as absolutely void, in the sense that no right or claim can be derived from them; and acts which are *mala prohibita*, which are void or voidable, according to the nature and effect of the act prohibited. *Fletcher v. Stone*, 3 Pick. 250. It was accordingly held in Massachusetts that a mortgage or assurance given on a usurious consideration, was only voidable, notwithstanding the strong words of the statute. *Green v. Kemp*, 13 Mass. 515. And in such cases, the advance of the money, although the contract is illegal for

usury, is a meritorious consideration, sufficient to support a subsequent liability or promise, when the positive bar of the statute has been removed." The statute was looked upon as, in effect, enabling the party sued to resist a recovery against him of the interest which he had agreed to pay; the court saying that the statute was penal in its nature, "inflicting upon the lender a loss and forfeiture to that extent."

The Supreme Court of Maine in *Holmes v. French* 68 Me. 525, has carefully pointed out the distinction in the effect of a statute which repeals one which declares usurious contracts void, and one which merely penalizes the usurer by giving the borrower the privilege of avoiding it by proper plea, as follows:

"Had this note been given under St. 1821, c. 19, which was in terms prohibitory, and declared that all contracts made in violation thereof 'shall be void,' there would be much force in the proposition, and reason as well as authority would sustain us in holding that the note would not be made valid by the mere repeal of the statute, the violation of which made it void. But St. 1821, c. 19, was very materially changed in 1834. St. 1834, c. 122. Its penal provisions were eliminated, so that when it became embodied in the revision of 1841 (R. S. 1841, c. 69, in force when the note in suit was made) it became remedial in its character. Chapter 69 fixed the legal rate of interest at 6 per cent, and provided two remedies in behalf of debtor

parties to contracts in which was reserved usurious interest, viz.: (1) In actions on such contracts, debtors could avoid the usurious portion by proving the usury under the general issue, and recover costs. (2) Whenever they had paid usurious interest, recover it back in an action commenced within one year after payment. *Tuxbury v. Abbot*, 59 Me. 466, 471. With the latter we now have nothing to do. The former is contingent upon the commencement of an action by the proper party. It is somewhat penal in its consequences; but the debtor cannot resort to it until he is put upon his defense by an action against him. So long as the remedy depends upon or is subject to this contingency, the right to resort to it is but inchoate at best. It is not founded upon the obligation of the contract, and is in no wise a vested right, unassailable under the Constitution. It is simply a remedy created by the statute, based upon what the legislature at the time considered the public good required; and the same authority, actuated by the same motives, recognized the change of circumstances which warranted their taking away what they had previously given, by a total abrogation of the statute which gave the remedy. This they had an undoubted right to do; and this they have done.—citing *Oriental Bank v. Freeze*, 18 Me. 109, 36 Am. Dec. 701.”

There seems to be little, if any, conflict in the authorities on the doctrine that where a usury statute does not declare the contract or any part of it void, but imposes a penalty or forfeiture of the whole or any part of the interest if the borrower sees fit to avail himself of the defense of usury, its repeal without a savings clause operates retrospectively so as to cut off the defense of usury for the future, even in actions upon contracts made while the law was in operation.

Our statute, Section 7055, which imposes a penalty for charging a rate of interest of more than one percent per month contains the language "except as otherwise permitted by law" any person who directly or indirectly receives any interest, etc., at a greater than one per cent per month shall be guilty of usury, etc. thus recognizing that some contracts which provide interest in excess of one per cent per month are not affected by this statute.

In view of the foregoing authorities, the Court is of the opinion that the Loan Act of 1939 is valid and that the plaintiff is entitled to recover judgment against the defendant, for the sum of \$4971.84, together with interest and costs.

Dated at Hilo, Hawaii, this 12 day of January,
A. D., 1944.

[Seal] /s/ RAY J. O'BRIEN,
Judge.

[Endorsed]: Filed Jan. 12, 1944.

[Title of Circuit Court and Cause.]

JUDGMENT

This cause coming on to be heard on the motion of the Plaintiff wherein it prays that judgment be entered herein against the Defendant, and it appearing by the record that the parties were at issue and came to trial before the Court without a jury, the same parties having waived a jury, and after said parties were fully heard and each had rested, thereafter, to-wit, on January 12, 1944, the written findings and decision of the Court were filed in said Court and cause, and the parties having been heard on a motion of judgment and for attorneys fees and for costs of Court, it is hereby

Ordered, Adjudged and Decreed that the Plaintiff have and recover from the Defendant the principal sum of \$4971.85 together with interest computed at the rate of 6% per annum from the date when each sum became due to the date hereof in the sum of \$1540.03; together with an attorneys fee of 10% of the principal and interest as allowed by the promissory notes, in the sum of \$651.19; together with costs of Court in the sum of \$24.00, or a total in the sum of \$7187.07.

Witness the Honorable Ray J. O'Brien, Judge of the said Court, on this 19th day of April, A. D. 1944.

[Seal] /s/ A. S. CARVALHO,

Clerk of the Circuit Court
of the Third Circuit.

[Endorsed]: Filed April 19, 1944.

In the Supreme Court of the Territory of Hawaii

October Term 1946

No. 2579

HILO FINANCE & THRIFT CO., LTD.

vs.

GEORE B. CAREY

EXCEPTIONS FROM CIRCUIT COURT,
THIRD CIRCUIT, HON. R. J. O'BRIEN,
JUDGE

o

Argued March 24, 1947. Decided April 11, 1947.
Kemp, C. J., Peters and Le Baron, JJ.

Promissory notes; licensed money lenders or industrial loan and investment companies; principal amount of loan; interest thereon deducted in advance at rate of one per cent a month for period of note; principal required to be paid in fifteen equal monthly installments; authorized by statute.

A duly licensed money lender under Act 154 S. L. H. 1933 was, or a duly licensed industrial loan and investment company under Act 231 S. L. H. 1937 and under it as amended by Act 75 S. L. H. 1939 is, empowered and authorized by the respective Acts to deduct interest on the principal amount of a promissory note in advance at the rate of one per cent a month for the period of the note and at the same time require that principal be paid in fifteen equal monthly installments.

OPINION OF THE COURT

By LE BARON, J.

Upon eight separate promissory notes, the plaintiff, as payee, after default of certain installments on and maturity of each note, brought in one suit an action against the defendant, as payer, to recover the aggregate amount on principal remaining unpaid. The terms of each note stipulate not only that the principal be paid in fifteen equal monthly installments, but that default of any installment renders the unpaid balance of principal due and payable. To this claim the defendant interposed the defense of usury and prayed for costs. He also filed a counterclaim for the total of the amounts of interest paid throughout the relationship of lender and borrower in excess of the total of the amounts of principal borrowed on the eight notes, the interest having been deducted in advance with respect not only to these present and partially satisfied notes but to thirty-eight prior and fully satisfied ones. The grounds of the counterclaim are that such interest on all forty-six notes is usurious and that they were executed on an open account pursuant to a corrupt agreement between the parties to circumvent the law pertaining to civil and criminal usury. Issue was joined and the causes were tried below jury waived. The trial judge by written decision allowed plaintiff's claim and disallowed defendant's counterclaim. Judgment was entered accordingly in favor of the plaintiff for the

unpaid principal together with costs and interest at six per cent on each installment from time of default.

The defendant excepted to the decision and judgment upon the ground that they are "contrary to the evidence and the law," citing twelve particulars thereof and reasons therefor. No useful purpose would be served here to set them forth. Suffice it to say that they are premised upon the assumption that the relationship of lender and borrower existing between the parties was a corrupt one at its inception and that usury tainted the loans made. In the absence of any dispute relative to the aggregate amount claimed to be unpaid on principal, the paramount question presented and upon which the efficacy of the appeal depends is not only whether the real intent of the parties was to evade the civil and criminal statutes on usury, but whether in making loans the parties actually violated any of such statutes, usury being purely a matter of statute in this jurisdiction.

Throughout the period covered by the claim and counterclaim, the plaintiff was a corporation engaged in the business of lending money and the defendant an individual engaged in selling sewing machines, the business of which necessitated the borrowing of money. In 1934, preliminary to entry into the relationship, the parties had an oral understanding that the defendant upon estimate of his business needs for money would, from time to time, apply for a loan when he had sufficient sale contracts of his customers to offer as collateral secur-

ity; that the plaintiff, if it accepted the application, would make the loan deducting interest in advance; that execution of contract would be upon plaintiff's printed form of installment promissory note; that plaintiff to accommodate defendant would extend the ordinary period of one year to that of fifteen months and agree to make substantial rebates of interest for prompt payment of the monthly principal installments. This understanding did not look forward to a single loan to be repaid by serial notes, nor did it regard prospective loans as one transaction or as a running or open account, but rather as distinct undertakings and different contracts to be settled and closed separately, each being one into which both parties would be free to enter. Hence it was not in the nature of a binding obligation, but merely served to make clear the plaintiff's usual business practice and clarify the conditions and terms upon which loans would be made severally or respective applications as accepted. At the time of understanding and during the period in which the first thirty-eight notes, as distinguished from the last eight of the forty-six, were executed, the plaintiff was a "money lender" within the meaning of and duly licensed under Act 154 of Sessions Laws of Hawaii 1933. (C. 233, §§ 7060-7068 R. L. H. 1935, repealed by § 2 of Act 231 S. L. H. 1937 which amended title XXIV of the Revised Laws of Hawaii 1935 by adding a new chapter thereto, i.e., c. 223-A, as well as forty-two new sections, the new chapter being amended by Act 75 S. L. H. 1939, now c. 170, §§ 8801-8827 R.

L. H. 1945.) Section 4(a) of Act 154, *supra* (§ 7064(1) R. L. H. 1935), expressly empowered such money lender "To loan money on personal security, or otherwise, and to deduct interest therefor in advance at the rate of one per cent per month, or less and, in addition, may receive and require uniform * * * monthly installments." This plain and unambiguous grant of power speaks for itself and needs no judicial construction. The undisputed evidence shows that the oral understanding was in accordance with future exercise of that existing statutory power and constituted one ordinarily expected of prudent business men about to deal reciprocally. There is not a scintilla of evidence in the record tending to prove that the parties in contemplating loans intended to evade any provisions of the Act or any statute on usury. Consequently those particulars and reasons, alleged in support of the exceptions and assigning a corrupt agreement to commit usury, are untenable and without merit.

The next question is whether as a matter of law and fact any of the forty-six notes involved or combination thereof is usurious or violative of the statutes pertaining to usury. To determine this question it is first necessary to ascertain whether at the particular times of execution beginning with that of April 10, 1934, the date of the first note, and ending with that of March 8, 1938, the date of the last and forty-sixth (the others having been executed between those dates at approximately one month intervals), the plaintiff had statutory power

and authority to deduct interest in advance and require monthly installments of principal. As already indicated, when the first and fully satisfied thirty-eight notes were executed the plaintiff had such power and authority under section 4(a) of Act 154 of Session Laws of Hawaii 1933. Thereafter and before the last and partially satisfied eight notes were executed, this enactment was repealed by section 2 of Act 231 of Session Laws of Hawaii 1937, effective July 1, 1937. However, section 1 of Act 231, *supra*, adds *inter alia* a new section to title XXIV of the Revised Laws of Hawaii 1935. This new section is numbered 6782-N and grants to duly licensed industrial loan and investment companies the identical power which section 5(a) of Act 154, *supra*, granted to duly licensed money lenders. Thus in effect the addition of section 6782-N in conjunction with the passage of section 2 of Act 231, *supra*, operates to transfer that power from pre-existing licensed lenders to existing ones but does not change it. Nor was the transferred power subsequently altered by the amendatory enactment of Act 75 of Session Laws of Hawaii 1939 (see § 6782-L, 2(a)) in so far as it applied to the particular period and type of contracts represented by the last eight promissory notes of fifteen equal principal installments upon which notes the plaintiff brought suit after the effective date of such amending Act of 1939. Section 6782-N in granting this power speaks for itself with a force equal to the prior grant thereof by section 4(a), *supra*, and likewise requires no judicial construction. In plain and un-

ambiguous language it reads: "Interest on loans made by any industrial loan and investment company, subject to this chapter, may be deducted in advance at the rate of but not exceeding one per centum (1%) per month, and in addition, the company may require and receive * * * monthly or other periodical installments * * *." Before August 31, 1937, the date of the first of the partially satisfied and successively dated eight notes, and at all times thereafter the plaintiff had and was qualified as a duly licensed "industrial loan and investment company" and operated its business under Act 231, *supra*. Consequently at the particular times of execution relative to all the notes, the plaintiff had full statutory power and continuing authority to deduct interest on each loan in advance and at the same time require monthly installments of principal.

That this power and authority were properly exercised in making loans is demonstrated by the face of the notes and the undisputed evidence, the parties having stipulated to the following facts: that interest for each loan was deducted in advance and in addition the principal amount of each loan was required to be paid in fifteen equal monthly installments, the balance of loan after deduction of interest being either paid to the defendant or, as done in most instances, applied at his request to installment payments due on pre-existing notes; that the money loaned upon execution of each note was either in the principal amount of \$2330 or \$1165, the deducted interest on these amounts being

in the sum of \$330 and \$165, respectively. From such it is evident that the loans complied with the provisions of section 4(a) of Act 154, *supra*, and those of the new section 6782-N added by Act 231, *supra*, as well as with those of section 6782-L, 2(a), of the amendatory Act 75 of Session Laws of Hawaii 1939, provided that the deductions of interest did not exceed the limit fixed thereby, which is constant.

Corroborative of the undisputed evidence to the same effect, it is a mathematical certainty that interest at the rate of one per cent a month for fifteen months (the period of each note) on principal amounts of \$2330 and \$1165 would be \$349.50 and \$174.75, respectively. The interest on such loans, which in this case was actually deducted in advance in the respective amounts of \$330 and \$165, is therefore not usurious, it not being at a rate greater than one per cent per month, but rather at a lesser one. Nor do the number of separate and distinct notes executed, and the application at the defendant's request of part or most of the money loaned on subsequent notes to installments due upon antecedent notes, taint the aggregate or render any usurious, usury not depending upon the mere plurality of successive loans to a borrower or the use to which he puts his borrowings. Hence as a matter of law and fact none of the notes or combination thereof is infected with usury, nor is any violative of either the criminal or civil statutes on usury. Consequently the remaining particulars and reasons supporting the exceptions and assigning usury are untenable and without merit.

No usury having been proved, neither section 7053 of Revised Laws of Hawaii 1935 providing remedies to a borrower upon proof of usury in an action by the lender to recover on a usurious contract, nor respective statutes making the receipt of usury a crime, have any application. A fortiori sections 6782-W (2) and 6782-X (2), (3) and (4) of Act 75 of Session Laws of Hawaii 1939 are likewise inapplicable and hence the constitutionality thereof need not be considered. Such inapplicability is evidenced by subsection (2) of section 6782-W in relating to proof that a greater rate of interest was contracted for than permitted by the Act, which in this case would be the same as authorized by Acts 154 and 231, both *supra*; by subsections (2) and (3) of section 6782-X in making unavailable "the defense of usury provided by chapter 232 and particularly section 7053 of the Revised Laws of Hawaii 1935" to a borrower in an action on a note by a lender duly licensed under either Act 154 or Act 231, both *supra*, and by subsection (4) thereof in providing "that no action to recover any interest * * * alleged to have been paid * * * by any obligor under any note or other contract made on or after the effective date of Act 154 of the Session Laws of Hawaii 1933, and before the effective date of this Act, in excess of the interest * * * legally chargeable or collectible under the law then in effect and applicable to the lender, shall lie or be instituted * * * against any person, firm, association or corporation which was duly licensed under either said Act 154, or Act 231, Series D-140 of Session

Laws of Hawaii 1937, at the time such note or contract was made.”

In the absence of usury, neither the case of *Helbush v. Mitchell*, 34 Haw. 639, nor that of *Carey v. Discount Corporation*, 36 Haw. 107, has any application. This is apparent from the authoritative holding of each. In the former it is to the effect that usury existed upon a finding by the court that the lender as a matter of fact did not deduct interest in advance, but on the contrary required the indebtedness with interest to be paid in equal periodic installments, such facts showing that he did not do that which section 4(a) of Act 154, *supra*, authorized, which obviously rendered inapplicable its provisions governing computation of interest in advance on principal payable by installments. The holding in the latter is to the effect that usury voluntarily paid cannot be recovered, the question having been presented by exceptions to the sustaining below of demurrers to complaints which alleged payments of usurious interest.

For the reasons assigned herein the decision allowing plaintiff's claim and disallowing defendant's counterclaim and the judgment in favor of plaintiff are not contrary to either the law or the evidence.

Exceptions overruled.

/s/ S. B. KEMP,

/s/ LOUIS LE BARON.

J. R. Cades (Smith, Wild, Beebe & Cades and Carlsmith & Carlsmith on the brief) for plaintiff.

P. Cass (Cass & Silver on the briefs) for defendant.

CONCURRING OPINION OF PETERS, J.

I concur in the result. I am in complete accord with the conclusion that the debtor-creditor relation existing between the parties to which the notes in question were the incidents was not corrupt or tainted with usury. But, in my opinion, the provisions of the 1933 and 1937 Acts in respect to the power to deduct interest in advance at the rate of one per cent per month, or less, and in addition to receive and require uniform weekly or monthly installments are not so clear and unambiguous as to justify jettisoning the immunizing provisions of the 1939 Act.

It is true that the *Helbush* case does not apply. We there expressly held that interest upon the promissory note involved had not been deducted in advance and in the absence of provisions in the 1933 Act fixing the legal rate of interest chargeable and the method of its computation the provisions of Revised Laws of Hawaii 1935, section 7053, applied to the former and the principles enunciated in the *Nawahi* case to the latter.

The mere admission of the parties in this case, however, that interest was physically deducted in advance at the respective times of the execution of the notes in question is not sufficient to remove the doubt that arises in my mind of efficacy of the language employed in both the 1933 and 1937 Acts in connection with the deductions of interest in advance to admit of the unqualified conclusion that the interest to be deducted is interest at the rate of one per cent per month for the duration of the loan

without credit for periodic installments paid by the obligor on account of principal. And it is unnecessary to decide that question for the reason that the immunizing provisions of the 1939 Act, under the facts of this case, deprive the defendant of the defense of usury and foreclose him from the recovery of the alleged usurious payments made by him on account of the notes subject to the counterclaim. I am content to rely for the determination of the issue in the instant case upon the provisions of the 1939 Act without speculating upon the legislative intention evinced by the language of the 1933 and 1937 Acts allowing deductions of interest in advance.

/s/ E. C. PETERS.

[Endorsed]: Filed April 11, 1947. Leoti V. Krone, Clerk Supreme Court.

[Title of Supreme Court and Cause.]

DECISION ON BILL OF EXCEPTIONS

Pursuant to the opinion of the above entitled Court, rendered and filed on the 11th day of April, 1947, in the above entitled cause, Defendant-Appellant's exceptions are overruled and the judgment of the Circuit Court of the Third Judicial Circuit is affirmed.

Dated at Honolulu, T. H., April 30, 1947.

[Seal] /s/ LOUIS LE BARON,

Justice of the Above Entitled
Court.

[Endorsed]: Filed April 30, 1947.

[Title of Court and Cause Omitted.]

PETITION FOR REHEARING

Comes now George B. Carey, appellant herein, and petitions this Honorable Court for a rehearing of the decision decided on April 11, 1947, by this Honorable Court. The petition for rehearing is upon the following grounds:

1. That the Court in its decision does not decide the constitutional question raised by the appellant herein that the interest charged on those transactions was admittedly in excess of one per cent per month, computed upon the money actually received by the borrower for the period of time he actually had the use of the money, that such excessive interest was a criminal offense, both under the general usury law and under the statute regulating money lender, that Sec. 7 of the Revised Laws of Hawaii, 1945, provides that transactions in contravention of a prohibitory law is void and the transaction being within that class is void. It was beyond the constitutional power of the Legislature to create an agreement between these parties so declared void by subsequent enactment of law purporting to validate usurious transaction.

2. That this Court in the case of *Helbush vs. Mitchell*, cited herein, held that the true rule of computing interest under the statute of 1933 was that interest was to be computed upon the actual amount of money received by the borrower and upon the unpaid balances as they become due and

not upon the face value of the note itself, that the Court ignores this rule as set up in the *Helbush vs. Mitchell* case as establishing a rule for computing interest and declares that there is no usury in this case when the interest was computed upon the face of the notes and not upon the amount of money received by the borrower, and it was deducted in advance upon the total of the loan and not upon descending balances, contrary to the law as expressed in *Helbush vs. Mitchell* by this Court.

3. That the defense in this action as to the principal was a defense of payment in full of said principal by the debtor to the creditor and that the account having been fully paid in accordance with the statute in effect at the time of the conclusion of the period of payments, the Legislature is without power now or in 1939 to declare that transaction still in existence merely by reason of the existence of the notes themselves in the hands of the creditor, the notes being merely "evidence" of a debt and not the debt itself.

Dated: Honolulu, T. H., this 30th day of April, 1947.

Respectfully submitted,
GEORGE B. CAREY.

By /s/ PHIL CASS,
His Attorney.

[Endorsed]: Filed April 30, 1947. Leote V. Krone, Clerk, Supreme Court.

(Title Court and Cause Omitted.)

DECISION DENYING
PETITION FOR REHEARING

Filed April 30, 1947. Decided May 1, 1947.

Kemp, C. J., Peters and Le Baron, JJ.

Per Curiam. The defendant petitions for a rehearing of the cause decided by this court in its opinion recorded on page 503 ante.

The stated grounds of his petition merely present questions which were fully briefed and argued by the parties and carefully considered by the court in its recorded opinion. They therefore do not constitute a sufficient basis upon which to entertain a rehearing.

Upon well-settled principles repeatedly enunciated by this court, the petition is denied without argument. P. Cass for the petition.

By the Court:

/s/ GUS K. SPROAT,
Clerk.

Approved:

/s/ S. B. KEMP,
Chief Justice.

/s/ E. C. PETERS,
Associate Justice.

/s/ LOUIS LE BARON,
Associate Justice.

[Endorsed]: Filed May 1, 1947. Gus K. Sproat,
Clerk, Supreme Court.

In the Supreme Court of the
Territory of Hawaii

No. 2579

GEORGE B. CAREY,

Petitioner,

vs.

HILO FINANCE & THRIFT CO., LTD.

Respondent.

PETITION FOR APPEAL

To the Honorable, the Chief Justice and Associate
Justices of the Supreme Court of the Territory
of Hawaii:

Comes now George B. Carey, Petitioner, by Brahan Houston, his Attorney, and deeming himself aggrieved by the judgment of this Court made and entered in the above entitled cause on April 30, 1947, pursuant to the Court's opinion filed on April 11, 1947, and the judgment of this Court entered May 1, 1947, denying his petition to Re-hear, prays that an appeal may be allowed from said judgments to the United States Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States in that behalf made and provided; that an order be made fixing the amount of cost bond that said Petitioner shall give and that the Clerk of the Supreme Court of the Territory of Hawaii be directed to send to the United States Cir-

cuit Court of Appeals for the Ninth Circuit a transcript of the record, proceedings, documentary exhibits and papers duly authenticated.

In connection with this petition Petitioner herewith presents its Assignment of Errors, and states that said judgments were rendered in an action in assumpsit and that the amount involved, exclusive of interest and costs, exceeds \$5,000.00.

Dated at Honolulu, T. H., this 19th day of June, 1947.

/s/ BRAHAN HOUSTON,
Attorney for Petitioner.

Territory of Hawaii,
City and County of Honolulu—ss. .

Brahan Houston, being first duly sworn, on oath deposes and says: That he is attorney for George B. Carey, Petitioner named in the foregoing petition for an appeal from the Supreme Court of the Territory of Hawaii to the United States Circuit Court of Appeals for the Ninth Circuit;

That he has read the foregoing petition and knows the contents thereof and that the matters and things therein set forth are true of his own knowledge, and that the value in controversy, exclusive of interest and cost, exceeds \$5,000.00.

/s/ BRAHAN HOUSTON,

Subscribed and sworn to before me this 19th day of June, 1947.

[Seal] /s/ LEOTI V. KRONE,
Clerk, Supreme Court,
Territory of Hawaii.

Service of a copy of the foregoing petition for appeal is hereby admitted this 19th day of June, 1947.

SMITH, WILD, BEEBE
AND CADES,

By /s/ J. RUSSELL CADES,
Attorneys for Hilo Finance
& Thrift Co., Ltd.

I do hereby certify that the foregoing is a full, true and correct copy of the original on file in the office of the clerk of the Supreme Court, Territory of Hawaii.

[Seal] /s/ LEOTI V. KRONE,
Clerk, Supreme Court
of Hawaii

Dated at Honolulu, T. H., June 19, A.D. 1947.

[Title of Supreme Court and Cause.]

ASSIGNMENT OF ERRORS

Assignment No. 1

The Supreme Court of the Territory of Hawaii hereinafter referred to as the "Court" erred in making and entering its judgments on the 30th day of April, 1947 and on the 1st day of May, 1947 in the above entitled court and cause.

Assignment No. 2

The Court erred in holding that appellant's continuous borrowing from appellee and his continuous paying to appellee of sums borrowed with interest

from April, 1934 to April, 1938 did not constitute an open or running account between the parties or an analogous transaction governed by the law applicable to open or running accounts.

Assignment No. 3

The Court erred in holding that the 46 notes executed by the appellant between April, 1934 and April, 1938 and payable to appellee, including the eight notes sued on, did not evidence and constitute an open or running account between the parties or an analogous transaction between the parties governed by the law applicable to open or running accounts.

Assignment No. 4

The Court erred in holding that the transaction between the parties as evidenced by the 46 notes executed by appellant between April, 1934 and April, 1938, and payable to Appellee and as further evidenced by the method of paying the first 38 of said notes was not violative of the statutes pertaining to usury.

Assignment No. 5

The court erred in calculating the interest paid by appellant on sums borrowed from appellee prior to the execution of the notes sued on and in failing to find that appellant had paid interest in excess of that allowed by law and in failing to apply said excess to the notes sued on.

Assignment No. 6

The court erred in construing Act 154, Session Laws of Hawaii, 1933, and Act 231, Session Laws of Hawaii, 1937, so as to authorize appellee to charge interest in excess of 15% of the amount advanced to appellant for 15 months.

Assignment No. 7

The court erred in construing Act 154, Session Laws of Hawaii, 1933, and Act 231, Session Laws of Hawaii, 1937, so as to authorize appellee to charge as interest 15% of the total of the amount actually advanced to appellant for 15 months plus an amount in excess of 15% thereof and to impose on appellant an obligation to pay the amount actually advanced plus 15% of said total sum and to deduct in advance the amount over and above the amount actually advanced, that is to say, the Court erred in holding that appellee was authorized to charge interest of 15% of the total of \$2000 plus 15% of \$2000, i. e., \$300 plus \$30—a total of \$330, the allowable interest as computed by the court being \$349.50.

Assignment No. 8

The court erred in construing Act 154, Session Laws of Hawaii, 1933, and Act 231, Session Laws of Hawaii, 1937, so as to authorize money lenders operating thereunder to add to the amount actually advanced to the borrower for fifteen months an additional sum not in excess of the total of 15% thereof plus 15% of the amount advanced. That is

to say, the Court erred in construing said acts so as to authorize said money lenders to impose an obligation on borrowers in the case of a \$2000 advance for 15 months to pay \$2000 plus \$352.94, 15% of \$2352.94, being \$352.94 and to deduct \$352.94 in advance.

Assignment No. 9

The court erred in holding that no one of the 46 notes involved and no combination thereof is usurious or violative of the statutes pertaining to usury.

Assignment No. 10

The court erred in holding that the case of *Helbush v. Mitchell*, 34 Haw. 639 was not applicable to the instant case.

Assignment No. 11

The court erred in pretermittting the material constitutional question raised by the appellant herein that the interest charged on the transactions involved was in excess of one per cent per month, computed upon the money actually received by the borrower for the whole period of the loan or for the period of time he actually had the use of the money, that the taking of such excessive interest was a criminal offense, both under the general usury law and under the statute regulating money lender, that Sec. 7 of the Revised Laws of Hawaii, 1945, provides that transactions in contravention of a prohibitory law are void and the transaction being within that class is void; that it was beyond the constitutional power of the Legislature to create an agreement

between these parties so declared void by subsequent enactment of law purporting to validate transaction.

Assignment No. 12

The court erred in rendering judgment for the appellee on its amended complaint and on appellant's setoff and counterclaim.

Wherefore petitioner George B. Carey prays that the judgments of the Supreme Court of the Territory of Hawaii entered in the above entitled cause on the 30th day of April, 1947 and the 1st day of May, 1947 be reversed and for such other and further relief as may be proper.

/s/ BRAHAN HOUSTON,
Attorney for Appellant.

Service of a copy hereof admitted 21 day of June, 1947.

SMITH, WILD, BEEBE
& CADES,
Attorneys for Appellee.

I do hereby certify that the foregoing is a full, true and correct copy of the original on file in the office of the clerk of the Supreme Court, Territory of Hawaii.

Dated at Honolulu, T. H., June 19, A.D. 1947.

[Seal] /s/ LEOTI V. KRONE,
Clerk, Supreme Court,
Territory of Hawaii.

[Title of Supreme Court and Cause.]

COST BOND

Know All Men By These Presents:

That George B. Carey as principal and W. K. Richardson and Amy W. Richardson as sureties are held and firmly bound unto Hilo Finance and Thrift Company, Limited, Respondent, hereinafter called the appellee, in the sum of \$250.00 for the payment of which well and truly to be made we bind ourselves and our heirs and assigns jointly and severally and firmly by these presents.

The condition of this obligation is such that:

Whereas the above bounden principal, George B. Carey has filed his petition for appeal from the Supreme Court of the Territory of Hawaii to the United States Circuit Court of Appeal for the 9th Circuit to reverse the judgments of said Supreme Court entered April 30, 1947 and May 1, 1947.

Now, therefore if the said principal shall prosecute his appeal with effect and answer all cost, if he fails to sustain said appeal, then this obligation shall be void, otherwise it remains in full force and effect.

Sealed with our seals and dated, at Honolulu, T. H., June 19th, 1947.

/s/ GEORGE B. CAREY,
Principal.

/s/ W. K. RICHARDSON,
Surety.

/s/ AMY W. RICHARDSON,
Surety.

Territory of Hawaii,
City and County of Honolulu—ss.

W. K. Richardson and Amy W. Richardson being first duly sworn depose and say that they have executed the foregoing cost bond in the sum of \$250.00; that they have property situate within the Territory of Hawaii subject to execution and that taken together they are worth in such property the amount of the penalty specified in said bond, that is, \$250.00 over and above all of their debts and liabilities.

Dated at Honolulu this 19th day of June, 1947.

/s/ W. K. RICHARDSON,

/s/ AMY W. RICHARDSON.

Subscribed and sworn to before me this 17th day of June, 1947.

PEARL RICHARDSON,

Notary Public, First Judicial Circuit, Territory of Hawaii.

My Commission Expires May 27, 1949.

The foregoing bond is hereby approved as to form, amount, and sufficiency of sureties.

[Seal] /s/ SAMUEL B. KEMP,

Chief Justice, Supreme Court,
Territory of Hawaii.

Service of copy of foregoing bond on appeal is hereby admitted.

Dated at Honolulu, this 21st day of June, 1947.

SMITH, WILD, BEEBE

AND CADES,

Attorney for Appellee.

I do hereby certify that the foregoing is a full, true and correct copy of the original on file in the office of the clerk of the Supreme Court, Territory of Hawaii.

Dated at Honolulu, T. H., June 19, A.D. 1947.

[Seal] /s/ LEOTI V. KRONE,
Clerk, Supreme Court,
Territory of Hawaii.

[Title of Supreme Court and Cause.]

ORDER ALLOWING APPEAL AND
FIXING AMOUNT OF BOND

Upon reading and filing in open court, the verified Petition of George B. Carey, Petitioner above named, in which he prays that an appeal may be allowed him from the judgments of this Court entered in the above entitled cause on April 30, 1947, and May 1, 1947, to the United States Circuit Court of Appeals for the Ninth Circuit, and upon said Petitioner filing an assignment of errors together with said petition for appeal together with a bond for costs in the sum of \$250.00,

It Is Hereby Ordered that said Appeal be and it is hereby allowed; that the bond for costs in the sum of \$250.00 filed by said George B. Carey, be and it is hereby approved; and that said petition for appeal, assignment of errors and bond for costs were filed in open court on the 19th day of June, 1947,

after the filing of said judgments; and this order is now made, and said appeal is allowed, all in open Court in the Supreme Court of the Territory of Hawaii.

Dated at Honolulu, T. H., this 19th day of June, 1947.

[Seal] /s/ SAMUEL B. KEMP,
Chief Justice of the Supreme Court of the Terri-
tory of Hawaii.

Service of a copy of the foregoing Order allowing appeal and fixing cost bond is hereby admitted this 21st day of June, 1947.

SMITH, WILD, BEEBE

& CADES,

Attorneys for Appellee.

I do hereby certify that the foregoing is a full, true and correct copy of the original on file in the office of the clerk of the Supreme Court, Territory of Hawaii.

Dated at Honolulu, T. H., June 19, A.D. 1947.

[Seal] /s/ LEOTI V. KRONE,
Clerk, Supreme Court,
Territory of Hawaii.

[Title of Supreme Court and Cause.]

CITATION

The United States of America—ss.

The President of the United States of America to
Hilo Finance and Thrift Company, Ltd., and
to Its Attorneys, Smith, Wild, Beebe and
Cades:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, State of California, within forty (40) days from the date of this Citation pursuant to an Appeal duly allowed and filed in open court by the Supreme Court of the Territory of Hawaii on the 19th day of June, 1947, in the above entitled cause, wherein George B. Carey is Appellant, and you, Hilo Finance & Thrift Co., Ltd., are Appellee, to show cause, if any, why the final judgments rendered against the said George B. Carey on April 30, 1947, and May 1, 1947, should not be corrected and why speedily justice should not be done to the parties in their behalf.

Witness the Honorable Samuel B. Kemp, Chief Justice of the Supreme Court of the Territory of Hawaii, this 19th day of June, 1947.

[Seal] /s/ SAMUEL B. KEMP,
 Chief Justice,
 Supreme Court of the
 Territory of Hawaii.

Attest:

[Seal]

LEOTI V. KRONE,

Clerk Supreme Court of the
Territory of Hawaii.

Service of a copy of the foregoing Citation is
hereby admitted this 21st day of June, 1947.

HILO FINANCE & THRIFT
COMPANY, LTD.

By SMITH, WILD, BEEBE
AND CADES,

Its Attorneys.

By /s/ J. RUSSELL CADES.

I do hereby certify that the foregoing is a full,
true and correct copy of the original on file in the
office of the Clerk of the Supreme Court of the
Territory of Hawaii.

Dated at Honolulu, T. H., June 19, A. D. 1947.

[Seal]

/s/ LEOTI V. KRONE,

Clerk, Supreme Court,
Territory of Hawaii.

[Title of Supreme Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the Above Entitled Court:

: You will please prepare and certify a transcript of the record of the above entitled cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit upon the appeal heretofore allowed herein and include in said transcript the following:

1. The record on appeal from the Third Circuit Court, Territory of Hawaii, to the Supreme Court of the Territory of Hawaii except:

- a. Appellant's Exhibits 3 to 34, inclusive;
- b. Appellee's Exhibits A to H, inclusive;
- c. Words and figures on back side of each of the eight cards, being Appellee's Exhibit N;
- d. Pages 1 to 18, inclusive, of the transcript of evidence and the first eight lines of page 19 thereof;
- e. Bill of Exceptions;
- f. Minutes of Clerk of Trial Court.

2. Amended Complaint.

3. Answer to Amended Complaint, Set-off and Counter Claim.

4. Answer to Set-off and Counter Claim.

5. Decision of Trial Court.

6. Judgment of Trial Court.

7. Opening and Reply Briefs filed by Appellant in the Supreme Court of the Territory of Hawaii.

8. Opinion of the Supreme Court of the Territory of Hawaii.

9. Decision of Supreme Court on Bill of Exception.

10. Appellant's Petition to Re-hear.

11. Per Curiam of Supreme Court of Territory of Hawaii denying Appellant's Petition to Re-hear.

12. Petition for Appeal.

13. Order allowing Appeal.

14. Citation on Appeal.

15. Assignments of Error.

16. Bond for Costs on Appeal.

17. Clerk's Certification of the Transcript.

18. This Praecipe.

In preparing above items 2 to 16, inclusive, Clerk will omit Title of Court and Cause.

/s/ BRAHAN HOUSTON,

Attorney for Appellant.

Received a copy of the above Praecipe this the 25th day of July, 1947.

SMITH, WILD, BEEBE

AND CADES,

Attorneys for Appellee.

By /s/ J. RUSSELL CADES.

I do hereby certify that the foregoing is a full, true and correct copy of the original on file in the office of the Clerk of the Supreme Court of the Territory of Hawaii.

Dated at Honolulu, T. H., July 25, A. D. 1947.

[Seal] /s/ LEOTI V. KRONE,

Clerk, Supreme Court,
Territory of Hawaii.

[Title of Supreme Court and Cause.]

AMENDED PRAECIPE FOR TRANSCRIPT
OF RECORD

To the Clerk of the Above Entitled Court:

You will please prepare and certify a transcript of the following exhibits contained in the record of the above entitled cause in addition to the items called for by the Praecipe heretofore filed:

1. Appellee's Exhibits A to H, inclusive.
2. Appellee's Exhibits I, J, K and L.

The following exhibits are not to be included in the transcript: Appellant's Exhibits 35, 39 and 40.

/s/ BRAHAN HOUSTON,
Attorney for Appellant.

Received a copy of the above Amended Praecipe this the 31st day of July, 1947.

SMITH, WILD, BEEBE
AND CADES,
Attorneys for Appellee.

By /s/ J. RUSSELL CADES.

I do hereby certify that the foregoing is a full, true and correct copy of the original on file in the office of the Clerk of the Supreme Court of the Territory of Hawaii.

Dated at Honolulu, T. H., Aug. 2, A. D. 1947.

[Seal] /s/ LEOTI V. KRONE,
Clerk, Supreme Court,
Territory of Hawaii.

[Title of Supreme Court and Cause.]

AMENDED PRAECIPE FOR TRANSCRIPT
OF RECORD

To the Clerk of the Above Entitled Court:

You will please omit item No. 7, i.e., Opening and Reply Briefs filed by Appellant in the Supreme Court of the Territory of Hawaii, called for in the Praecipe heretofore filed herein from your transcript of the record in this cause.

/s/ BRAHAN HOUSTON,
Attorney for Appellant.

Received a copy of the above Amended Praecipe this 7th day of August, 1947.

SMITH, WILD, BEEBE
AND CADES.

Attorneys for Appellee

By /s/ J. RUSSELL CADES.

I do hereby certify that the foregoing is a full, true and correct copy of the original on file in the office of the Clerk of the Supreme Court of the Territory of Hawaii.

Dated at Honolulu, T. H., Aug. 7, A. D. 1947.

[Seal] /s/ LEOTI V. KRONE,
Clerk, Supreme Court,
Territory of Hawaii.

[Title of Supreme Court and Cause.]

ORDER EXTENDING TIME

Upon application by Petitioner, George B. Carey, supported by Affidavit hereto annexed and good reasons appearing:

It Is Ordered that the time for the filing of the record and docketing of the above entitled cause in the U. S. Circuit Court of Appeals for the Ninth Circuit upon said Petitioner's appeal be and the same is hereby extended to and including August 16, 1947.

Dated at Honolulu, T. H., this 25th day of July, 1947.

[Seal] /s/ SAMUEL B. KEMP,
Chief Justice.

I do hereby certify that the foregoing is a full, true and correct copy of the original on file in the office of the Clerk of the Supreme Court of the Territory of Hawaii.

Dated at Honolulu, T. H., July 25, A. D. 1947.

[Seal] /s/ LEOTI V. KRONE,
Clerk, Supreme Court,
Territory of Hawaii.

[Title of Supreme Court and Cause.]

AFFIDAVIT

Brahan Houston, being duly sworn, deposes and says that he is counsel of record for George B. Carey, Petitioner in the above entitled cause; that the said George B. Carey has filed a Motion to extend time within which to certify the record in

this cause to the U. S. Circuit Court of Appeals for the Ninth Circuit on Appeal from the judgment of the above entitled court; that this Affidavit is filed in support of said Motion; that Affiant did not represent the said George B. Carey in the Trial Court nor in the Supreme Court; that he accepted employment after the judgment and the decision in the Supreme Court; that the record in the cause is voluminous; that the compilation thereof by affiant for purpose of appeal required much time in his familiarizing himself therewith; that the copying thereof by the Clerk required much time; that, although the record is now complete with the exception of an extensive Stipulation proposed to counsel for the Defendant for the purpose of abridging the record on appeal, counsel for Defendant will require time for the purpose of considering the same; that for these reasons the record on appeal cannot and will not be completed in time to file in the U. S. Court of Appeals for the Ninth Circuit by July 28, 1947, which is the last day for the filing of the record in said Court; that an extension of time to and including August 16, 1947, will be necessary to complete the record on appeal.

Dated at Honolulu, T. H., this 25th day of July, 1947.

BRAHAN HOUSTON

Subscribed and sworn to before me this 25th day of July, 1947.

/s/ FANNIE DANG,

Notary Public, First Judicial Circuit, Territory of Hawaii.

My commission expires April 3, 1948.

Dated at Honolulu, T. H., this 26th day of August, 1947.

/s/ BRAHAN HOUSTON,
Attorney for Appellant.

Service of a copy of above acknowledged this the 26th day of August, 1947.

SMITH, WILD, BEEBE
AND CADES,
Attorneys for Appellee.

By /s/ J. RUSSELL CADES.

[Endorsed]: Filed Aug. 28, 1947.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF RECORD FOR PRINTING

The appellant, George B. Carey through Brahan Houston, his attorney, designates the entire transcript of the record in this cause for printing.

Dated at Honolulu, T. H., this 26th day of August, 1947.

/s/ BRAHAN HOUSTON,
Attorney for Appellant.

Service of a copy of above acknowledged this 26th day of August, 1947.

SMITH, WILD, BEEBE
AND CADES,
Attorneys for Appellee.

By /s/ J. RUSSELL CADES.

[Endorsed]: Filed Aug. 28, 1947.

No. 11,703

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

GEORGE B. CAREY,

Appellant,

vs.

HILO FINANCE & THRIFT CO., LTD.,
a Corporation,

Appellee.

Upon Appeal from the Supreme Court of the
Territory of Hawaii.

APPELLANT'S OPENING BRIEF.

BRAHAN HOUSTON,

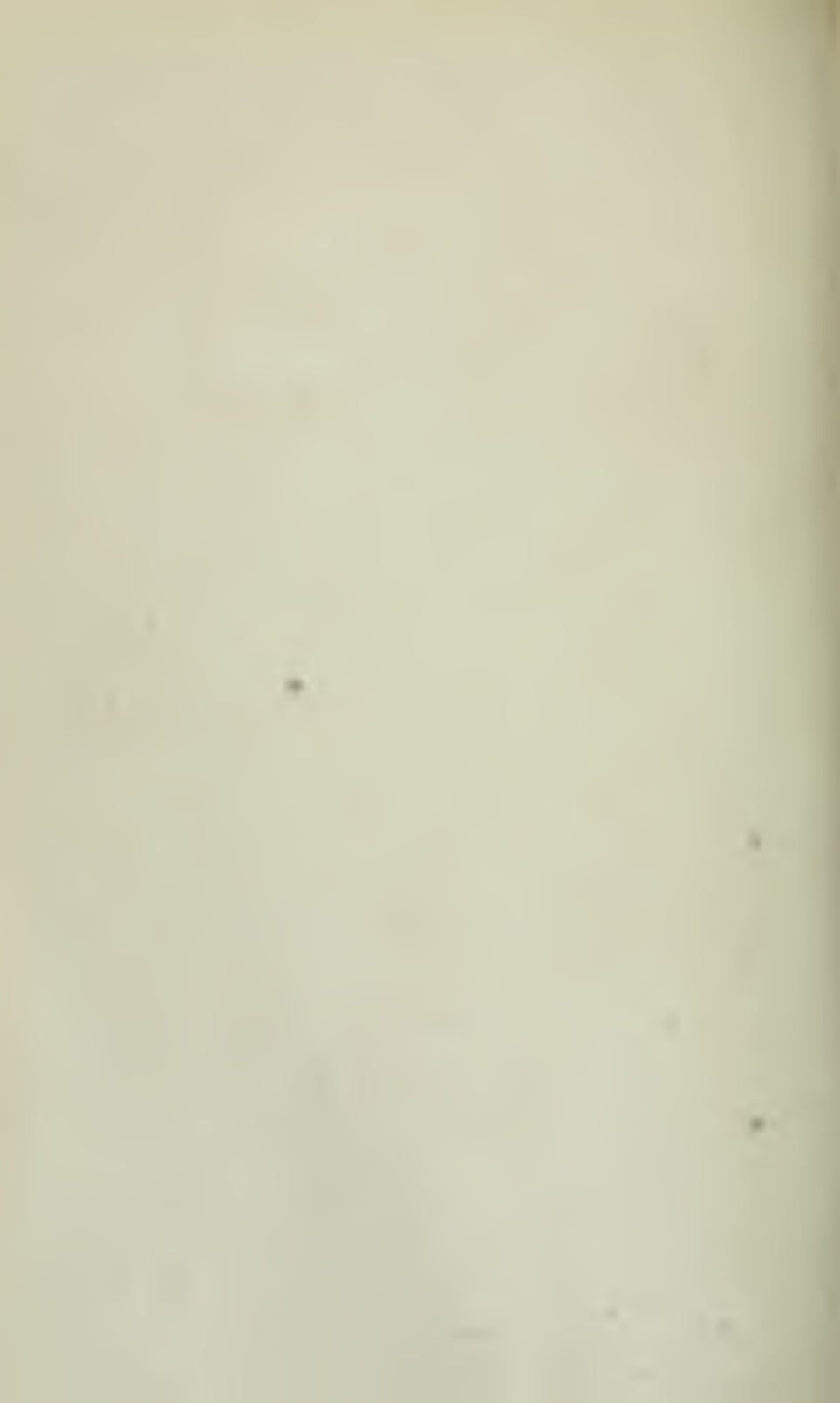
McCandless Building, Honolulu 16, T. H.,

Attorney for Appellant.

FILED

APR 15 1948

WILLIAM G. CURRIEN,



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No. 11,703

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

GEORGE B. CAREY,

Appellant,

vs.

HILO FINANCE & THRIFT CO., LTD.,
a Corporation,

Appellee.

Upon Appeal from the Supreme Court of the
Territory of Hawaii.

APPELLANT'S OPENING BRIEF.

STATEMENT OF PLEADINGS.

Plaintiff, a Hawaiian Corporation, sued defendant on eight installment promissory notes, the first being dated August 31, 1937, and the last March 8, 1938, for the aggregate installments due thereon in the sum of \$4,971.84 and for interest and attorney's fees, exhibiting the notes to its declaration (Tr. 2-42).

Defendant filed a general denial (Tr. 50) and a set off and counterclaim (Tr. 50-52).

In defendant's set off and counterclaim, he claimed that on or about November, 1933, he entered into a financing agreement with plaintiff, whereby plaintiff

agreed to lend him money as he needed it on open account on certain collateral, that thereafter on April 18, 1934, defendant commenced borrowing money from plaintiff pursuant to said agreement and continued to borrow on open account under said agreement until he had borrowed the total sum of \$17,973.32 for which he executed notes like those exhibited to plaintiff's declaration in the sum of \$104,850.00; that each note included interest at a rate greater than 2% per month; that defendant repaid plaintiff the entire principal sum of said loans on or before December 30, 1938, by paying to plaintiff the total sum of \$23,161.94 of which sum \$6,188.62 was paid on usurious interest; that he had paid all money borrowed from plaintiff under the loan contract, and in addition, \$6,188.62 in usurious interest. Defendant prayed judgment for \$6,188.62.

Plaintiff filed a general denial to defendant's set off and counterclaim and gave notice that it would rely on the defense of illegality, payment, and statute of limitations.

**FACTS SHOWING BASIS OF COURT'S JURISDICTION TO
REVIEW JUDGMENT OF SUPREME COURT OF HAWAII
AND STATUTE CONFERRING JURISDICTION.**

The judgment for the plaintiff sought to be reviewed in the sum of \$7,187.07 is final and exceeds the sum of \$5,000.00 exclusive of interest and costs.

Defendant's counterclaim for \$6,188.62, which was disallowed, constitutes a value in controversy which, exclusive of interest and costs, exceeds \$5,000.00.

Defendant contends that his payment to plaintiff of usurious interest operated *ipso facto* under applicable statutes to discharge his notes to which plaintiff applied the proceeds of the notes sued on, except one (Tr. 31) and that therefore, the notes were without consideration. The matter is thus not *in fieri*, but completed and executed. Act 75, Session Laws of Hawaii, 1939, Section 2, enacted after the notes involved were executed, is therefore unconstitutional in operating retroactively so as to deprive defendant of the defense of the effect of usury in discharging his said notes.

Defendant contends that plaintiff's charge and collection of usury was a criminal act and void under Section 7, Revised Laws of Hawaii, 1945, and that he is entitled, for this reason, to set off such usury against plaintiff's claim. The retroactive application of Act 75, Session Laws of Hawaii, 1939, Section 2, to defendant's said defense and the retroactive effect of said Act to deprive defendant thereof is unconstitutional.

The retroactive effect of Act 75, Session Laws of Hawaii, 1939, Section 2, in depriving defendant of his defense of usury to the notes sued on is in violation of the Constitution.

This Court therefore has jurisdiction to review the judgment appealed from by virtue of Judicial Code, Section 128, amended, Title 28, U.S.C.A., Section 225.

STATEMENT OF CASE.

(The parties will be referred to as in the trial Court, that is, appellant, George B. Carey, as defendant, and appellee, Hilo Finance & Thrift Co., Ltd., as plaintiff.)

This is a suit on eight (8) promissory notes for \$2,300.00 each, made Exhibits A-H to plaintiff's declaration (Tr. 22-43), dated August 31, September 28, October 29, November 17, November 30, December 31, 1937, January 31, and February 28, 1938. Other monthly notes executed by defendant for \$2,300.00, beginning in March, 1938 and continuing the series, are the basis of a later suit, since they were not due when the instant suit was commenced. Other monthly notes executed by defendant beginning in April, 1934 continue to August 3, 1938 when the last of these notes was executed before August 31, 1937, when the first and oldest note sued on herein was executed (Stipulation Tr. 195-6 and Tr. 199-238).

The consideration for the notes sued on, except Exhibit D (Tr. 29-31) was the discharge *pro tanto* of preceding monthly notes (Tr. 22, 25, 28, 34, 37, 40, 43). The consideration of the note next preceding the first note sued on (Tr. 195-196) was also the discharge *pro tanto* of preceding monthly notes (Tr. 238). In fact, all or a part of the proceeds of all notes executed prior to the date of the first note sued on, except those dated August 7, 1936 and April 16, and July 30, 1937 (Tr. 221, 225, 236) were applied to prior notes (Tr. 199-238). The fact that all these monthly notes are in series together with the method

of discharging prior notes by subsequent ones show that all notes are connected in a general transaction in the nature of a running loan account. And in order to determine how this account stands between the parties, it is necessary to look beyond the notes sued on and to ascertain what actually was the prior indebtedness, if any, to which subsequent notes were applied, i.e., the consideration for these notes may and must be inquired into.

That there was to be a running loan account between the parties under a general loan agreement is made clear by their original understanding. Defendant who was in the retail sewing machine business, selling machines on conditional sales contracts, made an arrangement with plaintiff for advances to finance his business, whereby he was to assign these contracts to plaintiff in amounts two and one-half times the advances as security therefor (Tr. 117). In addition to this security, defendant hypothecated his life insurance in the sum of \$10,000 (Tr. 118). After the parties agreed upon the security, it was understood between them that defendant would advance funds as defendant needed them to finance his business (Tr. 59) as long as defendant supplied the agreed security (Tr. 118-119) and this the plaintiff did over a period of approximately four years.

Plaintiff's witness, who made this arrangement between the parties (Tr. 59) testified that defendant was to borrow money as needed to finance his business (Tr. 59). This witness says, "There were to be fifteen installments on every loan * * *" (Tr. 60)

and he admits, though haltingly, that he testified in a former proceeding that plaintiff agreed to make advances to defendant over a period of time in the total sum of \$67,000.00 (Tr. 75-76). This witness reminded defendant in a letter dated December 26, 1935 (Tr. 234, 5) that defendant was to borrow from plaintiff only sufficient funds to finance Hilo sales. That it was defendant's agreement to advance funds as needed for this purpose is further evidenced by plaintiff's furnishing defendant with pads of 50 or 100 notes to cover future loans to be made under the agreement (Tr. 120). Performance by the parties further evidences the agreement.

The first loan under the agreement between the parties was to be about \$12,000.00 or \$15,000.00 in 12 monthly borrowings (Plaintiff's witness, Tr. 72). It was, in fact, \$13,885.00 in 13 borrowings as were all subsequent loans, except a few for \$6,942.52. It was the practice of plaintiff in making loans to defendant under the above-mentioned lending agreement in the case of a loan of \$13,885.00 spread over a period of 13 months and advanced in diminishing monthly installments beginning with \$2,000.00 and ending the 13th month with \$136.16 to take from defendant a series of 15 notes in the sum of \$2,330.00 each, payable in monthly installments of \$155.32 each, the first installment being due one month after date, each of said notes except the first being dated one month after the note preceding it. Under this arrangement, defendant received \$2,000.00 the first month; \$2,000.00 less \$155.32 or \$1,844.68 the second month, the de-

deducted \$155.32 being applied to the first installment in the same amount due on the first note, defendant received \$2,000.00 less two times \$155.32, i.e., \$310.64 or \$1,689.36 the third month, the two sums of \$155.32 deducted, being applied to the second monthly installment of \$155.32, due on the first note and the first monthly installment of \$155.32 due on the second note, and so on through the 15th note when, by calculation (see following Table A), there remained unpaid \$18,638.40 of defendant's note indebtedness, defendant having received the aggregate of the agreed loan of \$13,885.00 on the date of the 13th note (See following Table B).

Table A

	Note 1	Note 2	Note 3	Note 4	Note 5	Note 6	Note 7	Note 8	Note 9	Note 10	Note 11	Note 12	Note 13	Note 14	Note 15
d. Inst.	1	0													
d. "	2	1	0												
d. "	3	2	1	0											
d. "	4	3	2	1	0										
d. "	5	4	3	2	1	0									
d. "	6	5	4	3	2	1	0								
d. "	7	6	5	4	3	2	1	0							
d. "	8	7	6	5	4	3	2	1	0						
d. "	9	8	7	6	5	4	3	2	1	0					
d. "	10	9	8	7	6	5	4	3	2	1	0				
d. "	11	10	9	8	7	6	5	4	3	2	1	0			
d. "	12	11	10	9	8	7	6	5	4	3	2	1	0		
d. "	13	12	11	10	9	8	7	6	5	4	3	2	1	0	
d. "	14	13	12	11	10	9	8	7	6	5	4	3	2	1	0
ue	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15

One hundred twenty installments due on the 15 notes after execution of the 15th note.

Table B

First month	\$ 2,000.00
Second	1,844.68
Third	1,689.36
Fourth	1,534.04
Fifth	1,378.72
Sixth	1,223.40
Seventh	1,068.08
Eighth	912.76
Ninth	757.44
Tenth	602.12
Eleventh	446.80
Twelfth	291.48
Thirteenth	136.16

\$13,885.04

The difference between the remaining note indebtedness of \$18,638.40 after the 15th note and the cash received in the sum of \$13,885.00 is \$4,753.40, which represents the price or interest charged for the use of said sum of \$13,885.00.

This practice is illustrated by Exhibit 1-A (Tr. 191) relating to the first note involved. It is noted that \$77.66 of the proceeds was applied to defendant's pre-existing indebtedness to plaintiff. This amount is 1/15 of \$1,165.00. Notes in this amount due in 15 monthly installments were sometimes (Tr. 230-236) made by defendant instead of notes for \$2,330.00. Installments on such a note were due when the first note involved was executed as reflected by Exhibit 1-A. Another installment of \$77.66 was paid by the second note (Tr. 194) on which the amount credited to defendant's pre-existing debt to plaintiff was \$232.98 comprising \$77.66 plus \$155.32, the first installment due on the first note.

Defendant had the use of \$2,000.00 for the first month. He also had the use of this sum the second month plus the use of \$1,844.68, the amount he received for the second note or the use of \$3,844.68 the second month, and so on according to the following table C (see Table, Tr. 44 for loan of $\frac{1}{2}$ the amount):

Table C

First month	\$ 2,000.00	for one month
Second	3,844.68	“ “ “
Third	5,534.04	“ “ “
Fourth	7,068.08	“ “ “
Fifth	8,446.80	“ “ “
Sixth	9,670.20	“ “ “
Seventh	10,738.28	“ “ “
Eighth	11,651.04	“ “ “
Ninth	12,408.48	“ “ “
Tenth	13,010.60	“ “ “
Eleventh	13,457.40	“ “ “
Twelfth	13,748.88	“ “ “
Thirteenth	13,885.04	“ “ “
<hr/>		
Total	\$125,463.52	

Total interest at one per cent per month on the total of the above sums is \$1,254.64 (See Testimony, Plaintiff's Witness Tr. 93-96). The interest charged of \$4,753.40, as shown above exceeds the maximum legal interest of \$1,254.64 by \$3,498.76. Maximum legal interest will be conceded to be one per cent per month.

In anticipation of plaintiff's exception to the above Table C, on the ground that the figures do not include interest in advance, i. e., because the first figure of \$2,000.00, the actual amount advanced to defendant

the first month, does not have added to it maximum interest approved by the Supreme Court (Tr. 305) and as computed herein post page 36, another table is given below with such interest added to the 13 principals showing total interest of one percent on the total to be \$1,475.93. This table will not enter into later calculations, since it is believed to show excessive interest. In any event, it is the most that could be charged for the actual loan of \$13,885.04 and is less than the interest actually charged of \$4,753.40.

First month	\$ 2,354.00
Second	4,524.68
Third	6,512.04
Fourth	8,316.08
Fifth	9,937.80
Sixth	11,376.20
Seventh	12,632.28
Eighth	13,706.04
Ninth	14,596.48
Tenth	15,304.60
Eleventh	15,828.40
Twelfth	16,171.88
Thirteenth	16,332.04
<hr/>	
Total	\$147,593.52

Plaintiff through its treasurer admitted that it was charging illegal interest, as testified by defendant (Tr. 133). The treasurer did not deny the admission.

Prior to the first note sued on, dated August 31, 1937 (Tr. 20), defendant had executed 36 notes for \$2,330.00 each (Tr. 191-238), representing two series of 15 notes each or two loans of \$13,885.00 each, and in addition, six additional notes for \$2,330.00 each, presumably on a third loan as well as two notes for

\$1,165.00 each (Tr. 230-236). On the two loans represented by 30 of the 36 notes, defendant paid the sum of \$6,997.52, in excess of the maximum legal interest less rebates of \$2,083.66 (Tr. 191-225) or \$4,913.86.

On the additional six notes for \$2,330.00, he received \$9,670.20 (See Table B, *supra*), on which the maximum legal interest, as computed in the foregoing Table C was \$365.64, i. e., interest at one per cent per month on \$36,563.80.

Upon execution of the sixth note, there remained unpaid 10 installments of \$155.32 each on the first note, 11 on the second note, 12 on the third note, 13 on the fourth note, 14 on the fifth note and 15 on the sixth note, or 75 installments (See Table A, *supra*) of \$155.32 each, making a total of \$11,649.00. The difference between the cash in the sum of \$9,670.16 received by defendant on the six notes and the balance remaining unpaid thereon of \$11,649.00 is \$1,978.84 which represents interest charged. This sum exceeds the maximum legal interest of \$365.64 by \$1,613.22, which added to the above excess of \$4,913.86 makes \$6,527.08. There were no rebates on these six notes.

Or, considering each of the series of 15 notes, independently, and considering the actual loan on each to be \$2,000.00, payable with interest at one per cent per month in 15 months, the first installment of principal would be $\frac{1}{15}$ of \$2,000.00 or \$133.32, and the first installment of interest \$20.00; the second installment of principal would be \$133.32 and the second installment of interest of one per cent of the principal

in the sum of \$1,866.68, as reduced by payment of the first installment would be \$18.67. And so on, according to the Table (Tr. 283), until the total principal of \$2,000.00 was paid and a total interest of \$160.01. This method of computing interest is in accordance with *Helbush v. Mitchell*, 34 Haw. 639, referred to in the Argument, post, at page 18. The interest charge of \$330.00 exceeds this amount by \$169.99. On 36 notes, the total excess would be \$6,119.64, less the above-mentioned rebates of \$2,083.66 or \$4,035.98.

QUESTIONS INVOLVED

I. Has plaintiff charged usurious interest on loans to defendant prior to August 31, 1937, when the first note on which plaintiff sues was executed?

II. If plaintiff charged usurious interest, did the same apply *ipso facto* under applicable statutes to discharge defendant's indebtedness to plaintiff prior to the first note sued on, so that all notes sued on, save one (Tr. 31), were without consideration, there being no pre-existing notes to which to apply the proceeds? (See application of notes' proceeds, Tr. 22-43.)

III. If plaintiff charged usurious interest, was the interest rate in excess of two per cent per month on loans prior to May 17, 1937, and in excess of one per cent per month on loans thereafter, and thus forbidden by respective penal statute in force before and after said date?

IV. If plaintiff charged interest in violation of applicable penal statutes, was the charge void under Section 7, Revised Laws of Hawaii, 1945, so as to allow defendant on that ground to recover interest and principal paid under the charge?

V. If plaintiff charged usurious interest in violation of applicable penal statutes and the contract to collect same was void under Section 7, Revised Laws of Hawaii, 1945, did the usurious interest so paid by defendant apply *ipso facto* to discharge defendant's indebtedness to plaintiff so that there was no pre-existing indebtedness of defendant to which the proceeds of the notes sued on, save one (Tr. 31), could apply with the result that the notes were without consideration?

VI. If plaintiff charged usurious interest in excess of interest allowed by Act 75, Session Laws of Hawaii, 1939, or in excess of that allowed by prior applicable statutes, was the account between the parties such as to allow a credit to the extent of the usury on the balance due on the notes on which plaintiff sues, and should such credit be allowed?

VII. Did plaintiff charge interest on the loans represented by the notes sued on in excess of one per cent per month, the maximum allowed by penal statute, Act 222 (Chapter 232), Session Laws of Hawaii, 1937, and in excess of interest allowed by Act 75, Session Laws of Hawaii, 1939?

HOW QUESTIONS ARISE.

Defendant claims that he paid plaintiff legal interest prior to the notes sued on. He further claims that this illegal interest paid by him exceeded maximum interest allowed by Act 75 (Chapter 223-A), Session Laws of Hawaii, 1939, and that therefore, he is not deprived of the defense of usury by Section 6782X of said Act. Hence it is necessary, at the outset, to determine the existence of usury and the extent thereof.

Upon the finding that defendant paid interest in excess of that allowed by Act 75, *supra*, the effect of such payment on plaintiff's claim must be determined. This determination may be approached in two ways: (1) By limiting defendant's liability to pay principal without interest of loans made before first note sued on and regarding the principal as paid, so that in the case of all the notes sued on (Tr. 22-43), except one (Tr. 31), their proceeds were applied to pre-existing notes which had been paid by the application thereto of said excess interest; (2) By setting off the excess interest against plaintiff's claim.

Defendant further claims that plaintiff's contract for usurious interest on all notes, including those sued on, was in violation of a penal statute and therefore void under Section 7, Revised Laws of Hawaii, 1945, and that for this reason, he may recover both the principal and the interest, and that the notes sued on are void. It is necessary, therefore, to determine whether interest charged by plaintiff was such as was prohibited by penal statute.

SPECIFICATION OF ERRORS.**No. 1.**

The Supreme Court of the Territory of Hawaii, hereinafter referred to as the "Court", erred in making and entering its judgments on the 30th day of April, 1947, and on the 1st day of May, 1947, in the above entitled Court and cause.

No. 2.

The Court erred in holding that appellant's continuous borrowing from appellee and his continuous paying to appellee of sums borrowed with interest from April, 1934 to April, 1938 did not constitute an open or running account between the parties or an analogous transaction governed by the law applicable to open or running accounts.

No. 3.

The Court erred in holding that the 46 notes executed by the appellant between April, 1934 and April, 1938 and payable to appellee, including the eight notes sued on, did not evidence and constitute an open or running account between the parties or an analogous transaction between the parties governed by the law applicable to open or running accounts.

No. 4.

The Court erred in holding that the transaction between the parties as evidenced by the 46 notes executed by appellant between April, 1934 and April, 1938, and payable to appellee and as further evidenced

by the method of paying the first 38 of said notes was not violative of the statutes pertaining to usury.

No. 5.

The Court erred in calculating the interest paid by appellant on sums borrowed from appellee prior to the execution of the notes sued on and in failing to find that appellant had paid interest in excess of that allowed by law and in failing to apply said excess to the notes sued on.

No. 6.

The Court erred in construing Act 154, Session Laws of Hawaii, 1933, and Act 231, Session Laws of Hawaii, 1937, so as to authorize appellee to charge interest in excess of 15% of the amount advanced to appellant for 15 months.

No. 7.

The Court erred in construing Act 154, Session Laws of Hawaii, 1933, and Act 231, Session Laws of Hawaii, 1937, so as to authorize appellee to charge as interest 15% of the total of the amount actually advanced to appellant for 15 months plus an amount in excess of 15% thereof and to impose on appellant an obligation to pay the amount actually advanced plus 15% of said total sum and to deduct in advance the amount over and above the amount actually advanced, that is to say, the Court erred in holding that appellee was authorized to charge interest of 15% of the total of \$2,000.00 plus 15% of \$2,000.00, i. e., \$300.00 plus

\$30.00—a total of \$330.00, the allowable interest as computed by the Court being \$349.50.

No. 8.

The Court erred in construing Act 154, Session Laws of Hawaii, 1933, and Act 231, Session Laws of Hawaii, 1937, so as to authorize money lenders operating thereunder to add to the amount actually advanced to the borrower for 15 months an additional sum not in excess of the total of 15% thereof plus 15% of the amount advanced. That is to say, the Court erred in construing said acts so as to authorize said money lenders to impose an obligation on borrowers in the case of a \$2,000.00 advance for 15 months to pay \$2,000.00 plus \$352.94, 15% of \$2,352.94, being \$352.94, and to deduct \$352.94 in advance.

No. 9.

The Court erred in holding that no one of the 46 notes involved and no combination thereof is usurious or violative of the statutes pertaining to usury.

No. 10.

The Court erred in holding that the case of *Helbush v. Mitchell*, 34 Haw. 639, was not applicable to the instant case.

No. 11.

The Court erred in pretermittting the material constitutional question raised by the appellant herein that the interest charged on the transactions involved was in excess of one per cent per month, computed

upon the money actually received by the borrower for the whole period of the loan or for the period of time he actually had the use of the money, that the taking of such excessive interest was a criminal offense, both under the general usury law and under the statute regulating money lender, that Section 7 of the Revised Laws of Hawaii, 1945, provides that transactions in contravention of a prohibitory law are void and the transaction being within that class is void; that it was beyond the constitutional power of the Legislature to create an agreement between these parties so declared void by subsequent enactment of law purporting to validate transaction.

No. 12.

The Court erred in rendering judgment for the appellee on its amended complaint and on appellant's set off and counterclaim.

ARGUMENT.

APPLICATION OF CASE OF *HELBUSH v. MITCHELL* TO LOAN ACCOUNT INVOLVED.

In the case of *Helbush v. Mitchell*, 34 Haw. 639, a note like the ones involved herein and the law applicable thereto were considered. In this case, the action was to recover the balance due on an installment promissory note in the amount of \$2,350.00 payable in 40 semimonthly installments of \$58.75 each without provision for interest until after maturity. The consideration for the note was a loan of \$1,880.00.

The balance of the principal of note represented interest in the sum of \$470.00.

At the time of the execution of this note, Section 7064, Revised Laws of Hawaii, 1935, was in force. This section, quoted in the foot-note to the opinion in the *Helbush* case at page 641, reads as follows:

Every person, co-partnership or corporation under the provisions of this Act shall have power:
(a) To loan money on personal security, or otherwise, and to deduct interest therefor in advance at the rate of one percent per month, or less and, in addition, may receive and require uniform weekly or monthly installments.

Also in force at the time of the execution of this note was Section 7053, Revised Laws of Hawaii, 1935, which reads as follows:

If a greater rate of interest than one percentum per month shall be contracted for, the contract shall not, by reason thereof, be void. But if in any action on such contract proof be made that a greater rate of interest than one per centum per month has been directly or indirectly contracted for, the plaintiff shall only recover the principal and the defendant shall recover costs. If interest shall have been paid, judgment shall be for the principal less the amount of interest paid; provided, however, that this section shall not be held to apply to contracts for money lent upon bottomry bonds or upon other maritime risks nor to loans made under the provisions of Chapter 170.

The Court held that Section 7064, *supra*, did not apply because it neither prescribed nor limited the rate of interest except where interest is deducted in advance and because interest was not deducted in advance but was computed and added to the amount of the loan, and further, that Section 7053, *supra*, was applicable.

The Court further held that interest could be computed only upon the loan in the amount of \$1,880.00, that is, only upon the actual amount due for the actual period during which interest should run, and that Section 7064, *supra*, even if applicable, did not allow interest on installments.

The Court applying Section 7053, *supra*, computed interest as follows: The note, in the amount of \$2,350.00 was dated May 18, 1935. The first of the 40 installments was due May 30. The actual loan was \$1,880.00. On May 30, $1/40$ of the principal was due, i.e., \$47.00 plus interest at one per cent per month on \$1,880.00 for twelve days, i.e., \$72.774.00. On June 15, 1935, the due date of the second installment, the sum of \$47.00 was again due, plus interest of one per cent per month on the principal of \$1,880.00 less the paid first installment of \$47.00, i.e., \$9.46, and so on until the total principal of \$1,880.00 is paid, plus the total interest of \$189.39. The Court accordingly held that the interest charged of \$470.00 exceeded the maximum lawful interest by \$280.61; that under Section 7053, *supra*, the note in so far as it related to interest was void, and that all interest paid thereon was to be ap-

plied to reduce the principal of \$1,880.00. It follows that, if the note in the sum of \$2,350.00 had been paid in full, the payee would have held the sum of \$470.00 for the use and benefit of the maker, since this sum would have been paid on a void contract.

Section 7064, Revised Laws of Hawaii, 1935, which is Act 154, Session Laws of Hawaii, 1933, was in force when the first 38 of the notes herein involved were executed. The section was not materially amended by Act 231, Session Laws of Hawaii, 1937. (See opinion of Supreme Court (Tr. 303), Section 7053, Revised Laws of Hawaii, 1935, was in force when all the notes were executed.

It has been demonstrated that defendant received \$13,885.04 for his original 15 notes and owed the sum \$18,638.40 thereon after the 15th note. Interest therefore was \$4,753.36, and in excess of one per cent per month as shown above, page 9. If the loan on a series of 15 notes is regarded as being \$13,885.00, as defendant contends, it will be conceded that all such loans, as were made, were paid. Under Section 7053, Revised Laws of Hawaii, 1935, as applied in the *Helbush* case, plaintiff was only entitled to recover principal.

The proceeds aggregating \$14,000.00 of seven of the eight notes sued on were applied by plaintiff to defendant's pre-existing indebtedness to defendant. Action thereon is, in substance, an action on such pre-existing indebtedness. But this indebtedness, consisting of the principal of the loan or loans, was paid, and, since plaintiff was only entitled to recover prin-

cipal, he cannot recover on the seven notes. Plaintiff can only recover the balance claimed of \$621.48 on the 8th note (Tr. 31).

An alleged indebtedness or liability which does not in fact exist or which is not a binding and legally enforceable obligation of the obligor cannot ordinarily constitute a consideration for a bill or not. 10 C J. S., Bills and Notes, Section 150.

**DEFENDANT CLAIMS REFUND OF EXCESS INTEREST
BECAUSE CONTRACT THEREFOR VOID.**

Defendant's claim to such excess interest as he paid or to a credit therefor is not a claim to recover usury or in the nature of such a claim. Plaintiff contracted for and collected \$330.00 interest on a loan of \$2,000.00 for 15 months, which was reduced monthly by payments thereon of \$133.32 and on which interest at one per cent per month for 15 months amounts to \$160.01, as calculated above according to the case of *Helbush v. Mitchell, supra*. Plaintiff's charge and receipt of \$330.00 are in excess of two per cent per month, which would be \$320.02 and are a violation of the applicable criminal usury statute, Act 72, Sessions Laws of Hawaii, 1933, fixing the maximum interest rate of two per cent per month and Chapter 232, Session Laws of Hawaii, 1937 (post) fixing the maximum rate at one per cent per month. Chapter 232, *supra*, fixing the maximum interest rate at one per cent per month became effective May 17, 1937, and affects all notes beginning with the note of May 28, 1937.

It was shown above that plaintiff charged interest of \$4,753.40 on an installment loan of \$13,885.04 less rebates in the sum of \$2,083.66 (Tr. 191-225) or \$2,669.74, which is in excess of twice interest at one per cent per month computed above, page 9, as \$1,254.64 and is therefore in excess of two per cent per month and violative of said Act 72, *supra*.

At the time of these interest charges, plaintiff was qualified as a money lender under Act 154, Session Laws of Hawaii, 1933, which prohibited and penalized the charging of interest by licensees in excess of one per cent per month.

Plaintiff's contract being for interest in excess of two per cent per month and prohibited was void under Section 7, Revised Laws of Hawaii, 1945. (See 66 C. J., Usury, Section 180, 184, 232). Defendant is entitled to recover the total amount in the sum of \$26,-890.12 paid on all the notes (Tr. 232) or is entitled to credit therefor as for money had and received, Chapter 223-A, Session Laws of Hawaii, 1939, Section 6782X, purporting to deprive victims of usury of the defense of usury is inapplicable.

**LOAN ACCOUNT INVOLVED WAS RUNNING MUTUAL ACCOUNT
GOVERNED AS TO LIMITATION OF ACTION BY SECTION
10422, REVISED LAWS OF HAWAII, 1945.**

All pertinent evidence demonstrates, as shown in the statement of case, that the parties originally entered into a lending agreement which they performed. There is no evidence tending to disprove such agree-

ment. That the parties contemplated continuous loans is clear. The form and amount of security therefor was agreed upon (Tr. 117). The amount of the loans was to be determined by defendant's requirements for his Hilo Branch (Tr. 59), and was sufficiently definite under the circumstances. Plaintiff's witness says (Tr. 59), "The arrangement was that Mr. Carey (defendant) should borrow a subsequent sum a month with interest deducted which would give him the cash that he needed to finance his business in Hilo." Plaintiff's witness, who made the arrangement between the parties, and on their behalf, was auditor for both parties (Tr. 59) and for the defendant from 1932 to 1939 (Tr. 56). He was familiar with defendant's business and its financial requirements. He says he was familiar with the details of the agreement (Tr. 62). He prepared a financial statement of defendant's business (Tr. 73). He states that loans for the Discount Corporation, which defendant had formerly patronized were only small accounts (Tr. 73). He further states that defendant presented a budget providing for so much per month (Tr. 76). The parties, therefore, had ascertained with sufficient certainty the amounts defendant would require when they entered the agreement. In any case, by construction and performance of the agreement, the parties rendered it certain, since the loans were continuous and uniform with minor exceptions and interest was the same on all loans. (See 17 C. J. S. Contracts, Section 36-C, page 367).

The transactions between the parties have all the ear marks of an open running mutual account. They

were continuous, consisting of reciprocal dealings between the parties. Inspection of tables, Exhibit 1-A to 38-A (Tr. 191-238) and A1-H1 (Tr. 22-43) shows that after executing the first note on April 10, 1934 (Tr. 189), defendant was never out of debt to plaintiff; that he never received the principal of the notes except four (Tr. 31, 221, 230, 236); that the proceeds of all notes with the exceptions noted were applied to preceding notes; that in the cases of the excepted notes on which defendant received the principal, there were installments on preceding notes to become due after date of said notes. The notes were therefore component and connected parts of one continuing transaction.

The importance of an original lending agreement between the parties is that it would more clearly characterize the continuous loans as an open running mutual account, but it is not essential to such an account (*Trust Company v. Doe*, 146 P. 692, 26 Cal. App. 246).

It follows therefore under the applicable Statute of Limitation, Section 10422, Revised Laws of Hawaii, 1945, that the limitation began to run on defendant's set off and counter-claim for money had and received under a void contract on the date of defendant's last payment on December 31, 1938 (Tr. 43). The set off was filed in June, 1944. The statutory period is six years (Section 10421, Revised Laws of Hawaii, 1945).

The Supreme Court commented (Tr. 300-301) that this arrangement between the parties was without legal effect, but its comment is without basis in the

record and is *obiter*. The Court found that interest charges on notes prior to the ones sued on were unlawful. Hence, it was unnecessary to determine whether the nature of the account between the parties was such as to permit the setting off of prior excess interest against plaintiff's claim.

So far as the application of interest to the principal as a defense for the purpose of defeating recovery is concerned, the Statute of Limitation does not apply (66 C. J., Usury, Section 282).

ACTUAL TRANSACTION BETWEEN PARTIES.

Plaintiff's witness testified, as pointed out above, that the first loan in April, 1934, was to be about \$12,000.00 or \$15,000.00 in 12 monthly borrowings (Tr. 72). He must have calculated the total of the amounts actually received by defendant as shown by Table B, *supra*, page 9, i.e., \$2,000.00, the first month; \$1,844.68 the second month, and so on aggregating around \$14,000.00. Otherwise, the amount and number of borrowings could not have been arrived at. The loan was in fact \$13,885.04 in 13 borrowings as were all the other loans except two (Tr. 230-236).

Plaintiff's witness testified (Tr. 83-4) that in the case of a series of 15 notes for \$1,165.00 each, defendant would receive \$1,000.00 the first month; \$922.34 the second month, and so on in twice the sums stated in Table B, *supra*, which related to a loan of twice \$1,165.00 or \$2,330.00.

The same witness points out (Tr. 93-94) that in the case of a series of 15 notes for \$1,165.00 each, defendant had the equivalent of use of \$62,731.76 for one month. (See Table C, *supra*, page 9).

The actual transaction between the parties would not have been different if defendant had proposed to borrow and plaintiff had agreed to lend the sum of \$13,885.04 in installments as it was actually advanced at maximum legal interest. It may be assumed that plaintiff would nevertheless have made the same requirement of 15 monthly notes for \$2,330.00 each, but the requirement in such a case would be more clearly a device to extort usury.

Suppose the first note was not due in installments and that defendant had not chosen to pay any part of it and had chosen to borrow only the sum which he actually received, that is \$1,844.68, and had given his note for this sum plus interest. Plaintiff would have the first note for \$2,000.00 plus interest on which he advanced \$2,000.00 and the second note for \$1,844.68 plus interest on which he advanced \$1,844.68. And suppose defendant exercised the same choice the third month, paid nothing on the first or second notes, borrowed only what he actually received, that is \$1,689.36, according to Table B, *supra*, page 8, and gave his note for this sum plus interest, and so on through the 13th month.

Maximum legal interest as inferentially approved by the Supreme Court would be \$354.00 (see *post*, page 36) on the first loan of \$2,000.00, 15 per cent

of \$2,354.00 being \$354.00, and \$325.53 on the second loan of \$1,844.68, and so on according to the following Table "D":

\$ 2,000.00	\$ 354.00
1,844.68	325.53
1,689.36	298.14
1,534.04	270.73
1,378.72	243.30
1,223.40	215.89
1,068.08	188.48
912.76	161.07
757.44	133.66
602.12	106.25
446.80	91.78
291.48	51.43
136.16	24.02
<hr/>	<hr/>
\$13,885.04	\$2,464.28

Maximum interest on the amount actually received is \$2,464.28, which is also the maximum interest allowed by Chapter 232, Session Laws of Hawaii, 1939. And since the interest charged by plaintiff exceeds this maximum said Act by its terms (Section 6782X) does not deprive defendant of his defense of usury. The amount of interest actually charged for a total loan of \$13,885.04 was \$4,753.40, *supra*, less rebates of \$2,083.66 or \$2,669.74, page 10, which exceeds maximum interest of \$2,464.28 by \$205.46. Plaintiff, through its treasurer, admitted to defendant that plaintiff was charging illegal interest (Tr. 133). The treasurer did not deny the admission.

The device of the 15 monthly notes was only calculated to increase the interest on the loan. Plaintiff's witness says (Tr. 180) that there was no agreement for defendant to borrow every month and that, if he chose to borrow, he could apply the proceeds as he pleased, meaning that defendant chose to receive \$1,844.68 on the second note and to let plaintiff apply the remaining \$155.32 of the principal to the first note. But the plaintiff knew or soon came to know that defendant would borrow every month, if not by compulsion of an agreement by the greater compulsion of necessity. Defendant needed money monthly to operate his Hilo business (Tr. 118). It was plaintiff who was under an agreement to lend monthly upon defendant's furnishing the agreed collateral (Tr. 118). When defendant executed the 10th note of a series of 15 notes, 9 installments aggregating \$1,395.00 were due on preceding notes, prior installments thereon having been paid by credits. Defendant's testimony (Tr. 139) is undisputed that he was unable to pay sums around \$2,000.00 a month to defendant; that if he had had collateral contracts, he would never have stopped borrowing because he did not have finances to make payments instead of renewing his notes.

After repeated transactions of the same kind over a period of four years, the parties knew that defendant would receive diminishing balances on his monthly loans because of increasing credits to prior notes and they knew the amounts of these balances. They knew also that defendant could not pay pre-existing notes

in cash and therefore that he had to make new notes. The aggregate principal of the 46 notes involved is \$90,000.00, of which by computation \$68,618.98 was applied to pre-existing notes. See Appendix I, for a picture of plaintiff's web in which defendant became enmeshed.

Defendant was caught in this web when he executed the first series of 15 notes and became obligated thereby to pay \$18,638.40 for an advance of \$13,885.04 (see *supra*, page 7). It was the application of the proceeds of the first series of notes to installments due thereon and the consequent reduction of the amounts received thereon by defendant which was the catalyst of the excessive interest. Defendant owed plaintiff a note indebtedness of \$18,638.40 after the 15th note for cash received of \$13,885.04, defendant's indebtedness embracing usurious interest (*supra*, page 9). Subsequent notes to pay, defer or renew this indebtedness were infected with usury to the same extent (66 C. J., Usury, Section 203). Upon payment of this indebtedness, the new loan or loans paid, as was the first, were likewise infected with the same element of usury.

The Supreme Court failed to see through the maze of notes, installments, and credits to the real transaction between the parties. In this connection, the text of 27 R. C. L., Usury, at page 211, is apposite. It reads as follows:

*“Devices to Conceal Usury—*The cupidity of lenders, and the willingness of borrowers to concede whatever may be demanded or to promise

whatever may be exacted in order to obtain temporary relief from financial embarrassment, as would naturally be expected, have resulted in a great variety of devices to evade the usury laws; and to frustrate such evasions the courts have been compelled to look beyond the form of a transaction to its substance, and they have laid it down as an inflexible rule that the mere form is immaterial, but that it is the substance which must be considered."

Whatever the method of computing interest and whatever the rate, the basic figure is the amount the borrower had the use of. There is no gainsaying that in the case of a transaction between the parties involving 15 notes for \$2,330.00 each, the total amount received by defendant was \$13,885.04, and that it is only on this amount that interest may be computed.

OPINION OF SUPREME COURT.

In *Helbush v. Mitchell*, supra, the Supreme Court in considering the applicability of Section 7064, Revised Laws of Hawaii, 1935, quoted above page 18 to the note therein involved held that the lender had not deducted interest in advance, but had computed and added it to the principal. The Court held therefore that the provision in said Act for interest of one per cent per month where interest is deducted in advance was not applicable and applied, Section 7053, Revised Laws of Hawaii, 1935, quoted above at page 19. The note was for \$2,350.00 due in 40 installments

of \$58.75 each, principal being \$1,880.00 and interest \$470.00.

In the instant case, the notes are for \$2,330.00 each, due in installments of \$155.32 each, principal being \$2,000.00 and interest \$330.00. Interest was not deducted in advance if it was not deducted in advance in the *Helbush* case; it was computed in advance and added to the principal, if this was done in the *Helbush* case. For in both cases, interest was computed and added in advance or deducted in advance in exactly the same way. It would seem therefore, that the provision for interest in Section 7064 would not apply in the instant case and that Section 7053 would apply as in the *Helbush* case.

Th Court in the instant case says correctly that the Court in the *Helbush* case applied Section 7053, *supra*, and found the charge of interest to be usurious because the Court found that the lender did not deduct interest in advance, but required the indebtedness with interest to be paid in installments exactly as in the instant case. The Court in the instant case then distinguished the *Helbush* case because in that case, interest was not deducted in advance, and because in the instant case, interest was deducted in advance. The Court's ratiocination is difficult, if not impossible, to follow. Presumably, the Court would have followed the *Helbush* case, if it had found that interest on the notes involved was not deducted in advance.

The Court calls attention (Tr. 304) to the stipulation of the parties that interest was "deducted in

advance.” But the employment in the stipulation of the uncertain expression, “deducted in advance” does not determine or change the facts. What was done is clear. If the stipulation does not correctly describe what was done, the facts are to be considered not what was stipulated for the facts. The actual transaction with respect to interest is easier to understand than to describe in a word. See Chapter 223-A, Session Laws of Hawaii, 1939, Section 6782A(9) which reads, “Where interest * * * (is) paid in advance, deducted in advance, collected in advance, received in advance, or charged in advance * * *”. These several descriptions do not mean that there may be as many different interest transactions, but simply that the legislature was making sure that at least one of the descriptions would fit the actual and invariable transaction.

In any event, the Supreme Court does not overrule the *Helbush* case and distinguishes it only from the instant case. The *Helbush* case continues, therefore, to be determinative of defendant’s claim that all notes prior to the ones sued on were infected with usury as heretofore pointed out, and that under the *Helbush* case and its construction of Section 7053, Revised Laws of Hawaii, 1935, the usurious interest was applied to cancel the balance due on the notes sued on.

Under the *Helbush* case, interest on a loan of \$2,000.00 payable in 15 equal installments would be calculated, as indicated in the table (Tr. 283), that is, the principal of \$2,000.00 would be payable in 15 installments of \$133.32 each, and the interest of one per cent per month would be payable on diminishing bal-

ances of principal for the time the borrower had the use of such balances. The Court did not apply Section 7064, Revised Laws of Hawaii, 1935, *supra*, page 19, applying instead Section 7053, Revised Laws of Hawaii, 1935, *supra*, page 19 under the general rule that interest is to be computed on the actual amount due (*Helbush v. Mitchell*, 34 Haw. 639-45).

The Court in the instant case applied Section 7064, *supra*. The effect of this statute by the most liberal construction is to dispense with the general rule invoked in the *Helbush* case by which interest is computed on the amount due and to allow money lenders interest in advance on loans payable in installments. In this way, the lender receives interest as if the borrower had the use of the whole principal for the period of the installments, although the borrower reduces the principal each month. "Interest therefor" in the statute must mean interest on the loan. The loan in this case is \$2,000.00. Interest thereon at one per cent per month for 15 months is fifteen per cent of \$2,000.00 or \$300.00 for the use of the principal for the period of 15 months. The statute could hardly be stretched further than to allow this interest despite monthly reductions in principal. But the Court in the instant case says (Tr. 302) with reference to the statute "' * * * This plain and unambiguous grant of power speaks for itself * * *'" and says in effect (Tr. 304-305) that interest is not to be figured on the loan of \$2,000.00, but on the total of \$2,000.00 plus an unknown figure which can be arrived at only through algebraic process and that if fifteen per cent of this

total does not exceed the figure arrived at, the figure is interest allowed by the statute.

In the instant case, the sum of \$330.00, which plaintiff added to the \$2,000.00 loan, was picked out of thin air. It does not purport to be interest, although it serves an illegitimate factor in the computation of interest, i.e., fifteen per cent of \$2,330.00 is \$349.00, which the Court finds to be maximum legal interest (Tr. 305) where the factor in the computation is said figure of \$330.00. A different factor would, of course, make a different amount of interest.

The Court's approval of interest of \$349.00 on a \$2,000.00 loan due in 15 installments (Tr. 305) because fifteen per cent of the total of \$2,000.00 plus the sum of \$330.00, which was arbitrarily adopted and added, is \$349.00, is no less arbitrary than the addition of the sum of \$330.00. Certainly Section 7064, Revised Laws of Hawaii, 1933, on which the Court relies, does not contemplate the calculation of interest by missing numbers.

Suppose a borrower attempted to figure maximum interest which he would have to pay for a loan of \$2,000.00 due in 15 equal monthly installments under Section 7064, *supra*, as construed and applied by the Supreme Court. In the first place, he would have to be versed in algebra, for he would have to begin with the unknown quantity which he was trying to ascertain. For instance, let X equal the interest he would have to pay. Now the Supreme Court has said that interest is legal under the statute if fifteen per cent of the total of the interest plus the principal is equal

to the interest. Accordingly, fifteen per cent ($2,000 + X$) equals X , i.e., $300 + 15\%$ of $X = X$. The borrower here would have to know something about transposing. 85% of $X = 300$. Maybe, he could figure this out. 1% of $X = 3.53$. 100% of $X = \$353.00$ Q.E.D. Section 7064, Revised Laws of Hawaii, 1933, does not contemplate such calculation of interest.

If interest is to be computed in advance on the actual loan and added thereto to form the principal, and interest is computed on this principal, it would be fifteen per cent of $\$2,000.00$ plus $\$300.00$, $\$2,300.00$ or $\$345.00$. Interest charged in advance on unearned interest will not be allowed in the absence of the clearest statutory authorization. But without such authorization, the Supreme Court would allow interest in excess of $\$345.00$, i.e., $\$349.00$, which shows the Court's confusion.

The provision in Section 7064, Revised Laws of Hawaii, 1935, relating to interest was not changed by Chapter 223-A, Session Laws of Hawaii, 1937 (Opinion Tr. 303).

This Court will not adopt the Supreme Court's construing of a local statute to be black, if the statute is white, although it might feel constrained to adopt a brown construction of such a statute.

The Supreme Court construed said Section 7064 to provide the same interest as is expressly provided by Act 223-A, Session Laws of Hawaii (1939), enacted six years later. Act 223-A, Section 6782A(9) 6782A(A) and 6782L(a) provides for interest on the face of the note. What relation, if any, the face of

the note bears to the amount actually received by the borrower is not defined. For all that appears, the face of the note may be thrice the amount borrowed. Under such a statute, it would be proper to allow fifteen per cent interest on the face of the notes involved herein, i.e., \$2,300.00 as the Supreme Court did, but without the authorization of said (Act 223-A, or of any other Act).

The trial Court said (Tr. 285) that under Act 75 (Chapter 223-A) Session Laws of Hawaii, 1939, it would have been lawful for plaintiff to charge interest in the sum of \$349.50. The Supreme Court expressly approved this charge, but without the authorization of said Act 75, which became law after the notes sued on were executed.

The Supreme Court holds (Tr. 303) that Section 7064, Revised Laws of Hawaii, 1935 (Act 54, Session Laws of Hawaii, 1933) was not changed by Act 75 (Chapter 223-A) Session Laws of Hawaii, 1939. Nothing comparable to Section 9 (a) (b) of the latter Act appears in the former. This section expressly allows, *inter alia*, interest on the amount actually received by the borrower to be added to such amount to make the principal and allows, in addition, interest on this principal.

The section cannot be construed to allow the lender to charge interest on the loan, add it to the loan and charge interest on the total, as is expressly allowed by Chapter 223-A, Session Laws of Hawaii, 1939, Section 6782A(9)(B) enacted after the last note involved was executed. The section cannot be construed

to allow the lender arbitrarily to add an amount to the loan, as plaintiff herein added \$330.00, and to charge interest on the total. The section can only be construed to allow interest on installment loans despite diminishing balances.

NOTES SUED ON ARE VOID.

It has been demonstrated that the maximum interest allowable under the Supreme Court's construction of Act 75, Session Laws of Hawaii, 1939, on the original loan to defendant of \$13,885.04 advanced in installments was \$2,464.28, ante page 28, and that plaintiff charged interest on said loan in the sum of \$4,753.40, ante page 10, less rebates of \$2,083.66 (Tr. 191-225) or \$2,669.74, which exceeded maximum interest by \$205.46. Notes representing the loan and given in payment thereof included the same excessive interest. The proceeds of seven of the notes, on which plaintiff sues, were applied to pre-existing notes which were infected with the same usury as the loan or notes which they paid. Therefore, the notes sued on are infected with usury to the same extent (66 C.J., Usury, Section 203). The making of the loan and the taking of the notes therefor by the plaintiff prior to the notes sued on was an illegal and prohibited Act under Acts 72 and 154, Session Laws of Hawaii, 1933, because of the usury. The notes are not enforceable for this reason and for the further reason that under Section 7, Revised Laws of Hawaii, 1945, the notes are void. They cannot, therefore, constitute consideration for

seven of the notes sued on (10 C.J.S., Bills and Notes, Section 150). These latter notes are, for this reason, not collectible and for the further reason that they, like the former ones, are infected with usury in violation of the aforesaid Acts and are not enforceable and void under said Section 7, Revised Laws of Hawaii, 1945. Plaintiff would accordingly be entitled to recover only the balance of \$621.48 due on note made Exhibit to the declaration (Tr. 31).

**PARTIAL FAILURE OF CONSIDERATION AND INDEFINITENESS
OF CONSIDERATION RENDER SEVEN OF NOTES SUED ON
UNENFORCEABLE.**

If the Court holds that plaintiff was entitled to charge \$300.00 interest, i.e., interest at one per cent per month for 15 months on a loan of \$2,000.00, and that plaintiff's charge of \$330.00 was \$30.00 in excess of allowable interest, it would follow that plaintiff could not recover the total of these \$30.00 excesses on each note accumulating prior to the notes sued on. It appears from the record that the proceeds in the sum of \$14,000.00 of seven of the notes sued on were credited to defendant's pre-existing indebtedness, that is, the consideration of these notes was payment of defendant's said indebtedness. But this indebtedness was less than plaintiff took it to be, if it embraced excessive and uncollectible interest. The presumption of consideration for said note is thus rebutted, and the burden is shifted to plaintiff to show what the consideration was 11 C.J.S., Bills and Notes, Section

155, page 80. It is impossible to demonstrate from the record what defendant's actual indebtedness was prior to the first note sued on, payment of which constituted consideration for seven of the notes sued on. Plaintiff, therefore, cannot recover on said notes and may recover only on the eighth on which he claims \$621.48 (Tr. 31).

CONCLUSION.

1.

Plaintiff charged interest in excess of that allowed by Act 75, Session Laws of Hawaii, 1939. Accordingly, Section 6782X of this Act preserves defendant's defense of usury provided by Section 7053, Revised Laws of Hawaii, 1935, under which plaintiff was entitled to recover only principal of loans without interest. Principals were paid prior to the notes sued on. Defendant therefore owed no pre-existing indebtedness, payment of which constituted consideration for seven of the notes sued on.

2.

Defendant's notes prior to notes sued on were void by the combined effect of penal statutes prohibiting the usury which tainted them and Section 7, Revised Laws of Hawaii, 1945. For the same reason the notes sued on are void or, in any case, not collectible since their consideration was payment of the preceding void notes.

3.

Because defendant paid principal and interest on void contracts, he is entitled to recover the whole amount paid.

4.

The Supreme Court's allowance of interest of \$330.00 on a loan of \$2,000.00 for 15 months was palpable error, at least, to the extent of \$30.00, since maximum interest would be \$300.00. Defendant's actual indebtedness, if any, prior to execution of the notes sued on was less than that to which plaintiff applied the proceeds of seven of the notes sued on. The consideration for said notes, therefore, fails in part and in part it is indefinite. Since upon this showing the burden is on plaintiff to show the amount of defendant's indebtedness to him to which it applied the proceeds of said notes, plaintiff cannot recover on said notes.

5.

The Supreme Court was clearly in error in its computation and allowance of interest, particularly in construing Act 154, Session Laws of Hawaii, 1933, as allowing the same extent of interest as Act 75, Session Laws of Hawaii, 1939. It is, therefore, necessary to reverse the case for a determination, among other things, of the effect of the usury collected by plaintiff on defendant's obligation to plaintiff. Defendant's obligation is less than claimed by plaintiff and to the extent that it is less, the amount of recovery on seven notes would be reduced, since the proceeds

of these notes were applied to defendant's said obligation.

* * * * *

It is felt that the Court will wish more light on this case than is afforded by the foregoing brief. Accordingly, a brief on behalf of defendant prepared by eminent counsel for the Supreme Court is added as Appendix II.

It is respectfully submitted that plaintiff cannot recover (that defendant should recover on his counterclaim) all principal and interest paid by him to defendant.

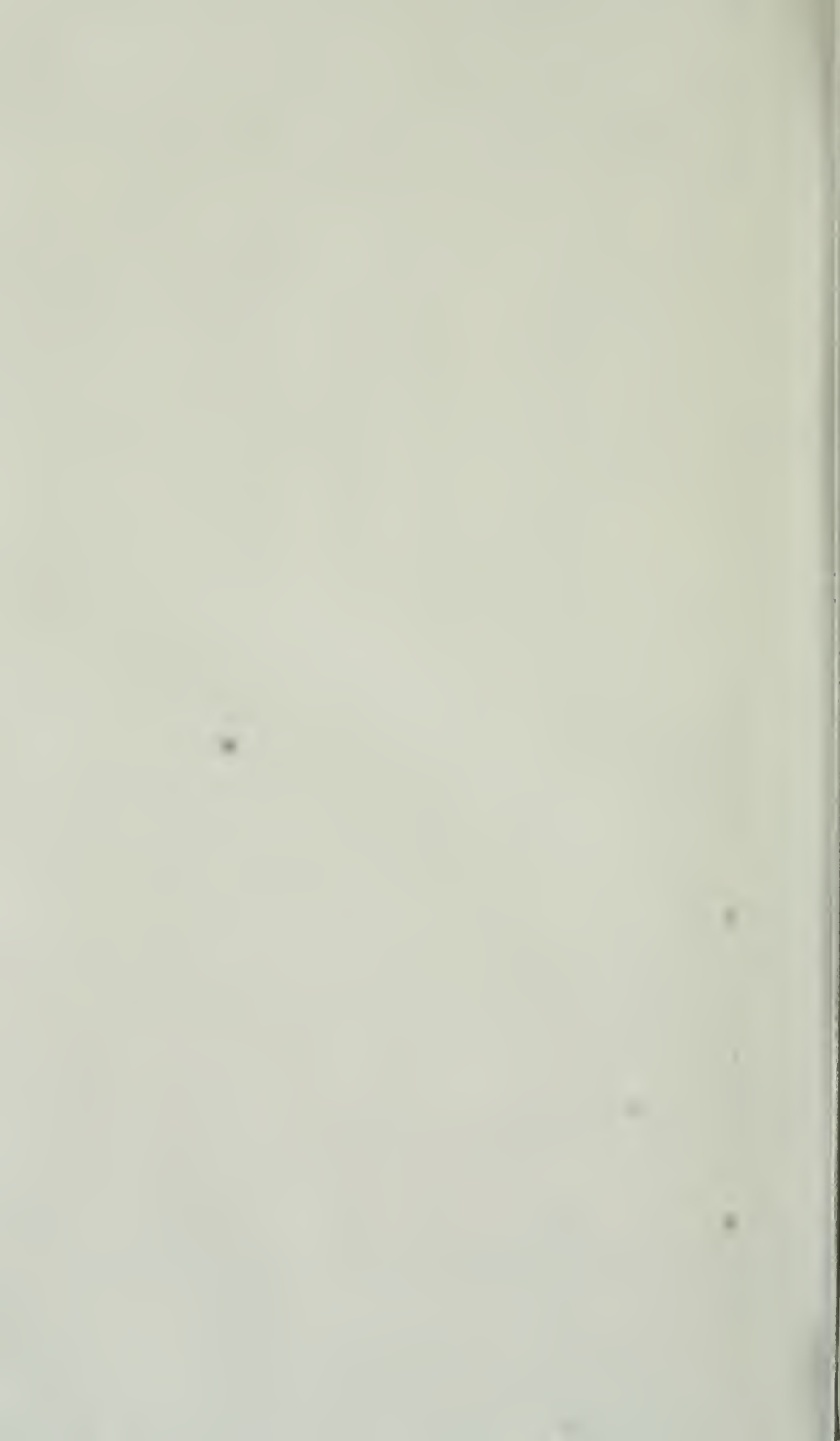
Dated, Honolulu, T. H.,

March 20, 1948.

BRAHAN HOUSTON,

Attorney for Appellant.

(Appendices I and II Follow.)



Appendix II

No. 2579

*In the Supreme Court of the
Territory of Hawaii*

Hilo Finance & Thrift Co., Ltd.,	}
Plaintiff-Appellee,	
vs.	
George B. Carey,	
Defendant-Appellant,	
Bank of Hawaii and Bishop	}
National Bank of Hawaii,	
Garnishees.	

APPELLANT'S OPENING BRIEF.

This is an action at law in assumpsit. The action was commenced in the Circuit Court of the Third Judicial Circuit on June 3, 1939. Jurisdiction is based upon Section 81 of the Organic Act, Territory of Hawaii; Section 3643, Revised Laws of Hawaii, 1935, Par. 5, confers upon the Circuit Court Jurisdiction to hear and determine all civil cases at law. Section 3593, Revised Laws of Hawaii, 1935, confers jurisdiction on the Supreme Court to hear and determine all matters brought before it on "exceptions duly perfected from any other Court". Section 3530, Revised Laws of Hawaii, 1935, grants the right to proceed to the Supreme Court on Bills of Exceptions.

On January 12, 1944, following a trial, the Honorable Ray J. O'Brien, Judge of the Third Circuit, made and filed his Decision in writing (Record pp. 51-64). An Exception to the Decision was filed January 20, 1944 by the Defendant (Record pp. 65-73). Judgment was entered April 19, 1944 (Record pp. 74-76.) Exception to Judgment was entered by the Defendant on April 20, 1944 (Record pp. 77-78). On April 19, 1944, Judge O'Brien signed an order allowing the Defendant up to and including June 1, 1944, to present his Bill of Exceptions. Pursuant to said order a Bill of Exceptions was presented to Judge O'Brien on May 15, 1944, which Bill of Exceptions was duly allowed by Judge O'Brien and filed on June 30, 1944. Thereafter, the said Defendant deposited with the Clerk of the Supreme Court \$25.00 for cost to accrue in the Supreme Court.

The jurisdictional steps set forth in Section 3530 and 3632, Revised Laws of Hawaii, 1935, have thus been taken and this Court has jurisdiction to review the Decision and Judgment of the lower Court.

B. STATEMENT OF FACTS.

Plaintiff is a corporation organized under the laws of the Territory of Hawaii, licensed as a money-lender under the Act 154, Session Laws of Hawaii, 1937 Industrial Loan Company Act (Stipulation p. 19, Transcript). The Defendant is a dealer in sewing machines, selling machines all over the Territory of

Hawaii on partial payments and having an agency of his business in Hilo. One, Hugh C. Tennent, a Certified Public Accountant and Auditor, was the auditor of both the Plaintiff and the Defendant in November of 1933 (Transcript p. 20). Tennent acted as intermediary between Plaintiff and Defendant to negotiate a financing contract by which a continuous series of loans was to be made by the financing corporation month by month to the Defendant (Transcript p. 23). The arrangement was that the Defendant was to put up as a security for his loan the assigned contracts of sale for sewing machines, originating in the Island of Hawaii, and that, as these contracts were put up as security month by month, the monthly loan would be acknowledged by a promissory note payable in 15 equal monthly payments, issued under the terms of the general contract (Transcript p. 23). The notes were either for \$1,000.00 or \$2,000.00 advanced to the Defendant. To this amount were added the so-called "interest deducted in advance." The note evidencing a \$1,000.00 advance was made for a face value of \$1,165.00 and the note evidencing a \$2,000.00 advance was made for a face value of \$2,330.00 (Transcript p. 24). There was a conditional agreement that there should be a rebate of interest for prompt payment made to the Defendant if all the terms of the note were met, which varied as to amount during the time this agreement was in effect. (Transcript p. 25). It was agreed as part of the original transaction that the financing arrangement between the parties could be terminated by the Defendant at any due date by the

payment of all sums then due (Transcript pp. 128-129).

Mr. Tennent, the auditor and intermediary in this transaction, was called as a witness for the Plaintiff and testified in minute detail as to the contract between the parties and, particularly, to a long hypothetical question upon the effect the contract's rate of interest upon the payment of a hypothetical thousand dollar note. The hypothetical question or situation upon which Mr. Tennent testified is this:

That if under the agreement as it existed between Plaintiff and Defendant, to wit: Defendant received \$2,000.00 on a \$2,330.00 note payable in 15 equal installments on the first of the month and thereafter on the 1st of each month executed a new similar note for which he received \$2,000.00 credit on the installments then due on preceding notes and the balance in cash, there would come a time, upon the execution of the 14 notes in series, when, not only would the installments then due not be paid by the execution of a new note, but additional cash would have to be advanced to meet the amounts due on the foregoing notes.

“Q. He has figured out the figures here that appear that on the first month the Defendant would get \$1,000, second month he would get \$922.34, the third month \$844.68, fourth month \$767.02, fifth month \$689.36, sixth month \$611.70, seventh month \$534.04, 8th month \$456.38, 9th month \$378.72, tenth month \$301.06, 11th month \$223.40, Twelfth month \$145.74, 13th month \$68.08, nothing the 14th or nothing the 15th.

A. Except the 15th he gets the rebate coming in.

Q. That is rebate start coming in on the first note?

Mr. Cades: We would be willing to stipulate that that is mathematically correct."

Transcript page 43.

At that time on series of thousand dollar notes, there would have been advanced to the borrower in actual cash \$6,942.52 (Transcript pp. 47, 48). Thereafter, no cash whatever would be advanced on account of the series of notes, but each month a new note would have to be executed to care for the installments then due and on the 15th payment, the whole amount of that installment would have to be advanced in addition to the execution of a new note plus \$77.66, the amount of shortage on a new note that covered the obligation on the 14th note, a total of \$242.66, which was required to maintain the balance of the loan in status quo.

Mr. Tennent testified and it was never disputed that under the circumstances related on the hypothetical question, that is, the renewal of the lump sum then due by the execution of the new note and payment of moneys which were due to keep the account in status quo, was at the interest rate of 42% per annum. Mr. Tennent testified that the actual transaction between Plaintiff and the Defendant resulted in a situation that was exactly like the hypothetical question in that a series of notes were given, repaid, as the installment became due by the issuance of succeeding notes and, finally by the maintenance of a status quo by the pay-

ment of Carey of the 42% rate of interest demanded for the continuance of the loan (Transcript p. 126).

Throughout the trial testimony was offered relative to the "rebate" offered for the prompt performance of the conditions of the loan by Mr. Carey. As to the notes upon which this action is brought, no rebates were allowed whatever. These rebates were entirely conditional upon prompt payment of the installment then due on each note and were never paid except in strict accordance with that agreement (Transcript pp. 30 and 31). And as the due date of installment on each note varied in accordance with the execution of the date of the note itself, the payments of credits secured by new note would be in accordance with the terms of some notes and not in accordance with the terms of others. A charge was made of one per cent per month for the deficiency for the period of delinquency. In 1938, Supreme Court decided the case of *Helbush v. Mitchell*, and, upon reading of that decision Mr. Carey, Defendant, decided that he was being robbed by usurious interest and refused to pay anything more on account of this contract and no rebate were offered or extended on any of the note subsequent at that time. The present action is based upon the face of the notes.

During the course of these transactions, Defendant received from Plaintiff \$17,973.32. Up to December 30, 1938, when the last payment was made by the Defendant, he had paid in to the Plaintiff \$26,890.12 (Exhibit 1A-40). These payments were all prior to December 30, 1938. Under the laws that existed at that time De-

fendant was entitled to credit for his loan in full payment of the principal of the loans made to him and the debt was entirely satisfied.

A tabulation of the exhibits in this case shows that the relations between the Plaintiff and the Defendant proceeded as follows:

The first series of notes continued to February 19, 1935. The date of execution of note 5840; at which time the Defendant received \$58.40 in cash and was credited on back payments on the prior notes \$1,941-.60. He had at this time run out of the series of notes by which he could obtain any money whatsoever. Thereafter, he paid to the Plaintiff on March 21, \$1,000.00; March 27, \$1,019.26; April 23, \$1,397.88; April 30, \$543.72; May 21, \$1,000.00; May 27, \$863.94, maintaining the status quo of his loans in accordance with the schedules set forth by Mr. Tennent for four months by payment of cash and at the same time paying off the installments on four notes which accrued during those months and leaving him with 11 notes on which there were unpaid installments and placing him in a position where on June 12 he could again put in a note to cover all of his installments and receive money. He then ran another series of notes until the end of the year and again he ran out of credit and paid \$1,864.04 on December 31 to maintain his position and pay one installment on the notes then due. In August of 1936, he again ran out of credit, starting September 29, 1936 he executed notes each month until June of 1937. On each of the months that he executed

notes in 1937, he paid an additional \$330.00 cash to maintain his balance with the company. In June of 1937, his accumulated notes caught up with him again and he began executing notes twice each month from then on and in addition to the notes he executed paying in sums of approximately \$640.00 a month to July 13, 1938 when the last note was executed. It is thus apparent, that the sums paid in to the Plaintiff each month during this whole period of nearly three years, represented merely an extension of the total debt over each month. The paper transaction of executing a note upon which were credited the balances then due had merely the effect of extending the due date for 30 days, and the profit to the lender for the use of the balance that was then payable for the 30 days was the total of the cash paid in computable in the manner designated by Mr. Tennent at 42% plus per annum or approximately three and one-half percent per month.

C. QUESTIONS INVOLVED.

1. Where parties enter into a financing contract, whereby money is to be advanced over a period of time, each advance evidenced by a promissory note, but the aggregate of the loan is treated as one account and is repayable at any time by the borrower and the sum of money is required by the lender and paid by the borrower for the extension of this lump sum in excess of 42% per year, is the contract for the pay-

ment of interest void under sections 7, 8736 and 8734 Revised Laws of Hawaii 1945?

2. Where notes on their face call for the maximum rate of legal interest, with interest deducted in advance to maturity, and the notes contain an acceleration clause automatically enforcing the penalty without return of the interest deducted in advance, which may cause the entire deducted interest to be applied for the use of the borrower's money for a minor fraction of the maturity date, is the contract *prima facie* usurious?

3. Where notes in accordance with their terms are accelerated instantly upon default without the option of the holder and, in 1938, the payee of the note refuses all further payment and claims the application of usurious interest to the extinguishment of all balances then outstanding on the notes or loan, are the notes and the loan so extinguished as of that date that the legislature of 1939 could not revive a debt between the loaner and the borrower?

4. Where a blanket financing contract is entered into between the parties whereby sums are to be advanced under that contract and notes are to be issued evidencing such advances, and the lump sum which is due at any one particular time may be paid off by the borrower; as a condition of extension of said lump sum for a period of thirty days (30), lender makes a demand for and receives interest payments or payments for forbearance, at a rate of 24% per annum or more on the sums then due and the lender is licensed

under the Industrial Loan and Investment Law, Chapter 170, Revised Laws of Hawaii 1945 and the Licensing Laws which preceded that act, is the lender under the protection of the saving clause of the Industrial Loan and Investment Law contained in Sections 6782-W and 6782-X of Act 75,, Session Laws of 1939 as shown on page 262 of the Session Law?

5. Does the legislature of Hawaii have the power to revive a contract for the payment of money which by the terms of preceding laws had been fully satisfied and extinguished between the parties by the application of usurious interest under the terms of Section 7053 Revised Laws of Hawaii 1935 and Section 8816 Revised Laws of Hawaii 1945?

D. HOW THE QUESTIONS ARE RAISED.

All these questions are concerned with the defense of payment raised by the Answer and by the evidence. They are also raised by the Exceptions to the Decision and the Exceptions to the Judgment.

E. SPECIFICATION OF ERRORS.

1. It was error for the trial judge to fail to apply all of the payments in this transaction to the satisfaction of these notes.

2. It was error for the trial judge to fail to consider the transaction as a whole and to compute the rate of interest which was charged on the basis of the

individual notes rather than the profits received from the whole transaction.

3. It was error for the trial judge not to hold that the transaction was attained with usury from its inception and that the whole of the notes had been satisfied by the application of the payments including usurious interest under the terms of Section 7053 of the Revised Laws of Hawaii 1935.

4. It was error for the trial judge to rule that the amendment to the Industrial Loan Act of 1939 revived a right of action which under the preceding law had been fully satisfied and cancelled by the exercise of Defendant's right to apply all the preceding payments to the satisfaction of these notes in 1938, when Carey ceased to pay anything on these notes and refused to pay further under the Decision in the Helbush case.

5. It was error for the trial judge to hold that the 1939 amendment to the Industrial Loan Act applied to the facts in this case, in that, it was shown that by the terms of the contract under which these notes were issued, the actual profit to the lender exceeded one per cent per month as a straight interest on the balance owing at the time of the collection of this profit.

6. It was error for the trial judge to hold that the contract for the payment of the interest, which was in violation of criminal statutes, was not void but merely voidable, and that the right of the maker of these notes to plead usury in defense of a transaction fully paid and satisfied in 1938 under the then statute,

could be revived by the legislature to create a new and valid contract for the payment of money.

7. It was error for the trial judge to fail to give judgment for the Defendant on his cross-complaint for the excess monies paid by the borrower to the lender under a void contract.

8. It was error for the trial judge to rule in the manner set forth in the Bill of Exceptions on the questions raised by that Bill.

F. ARGUMENT.

1. WHERE PARTIES ENTER INTO A FINANCING CONTRACT, WHEREBY MONEY IS TO BE ADVANCED OVER A PERIOD OF TIME, EACH ADVANCE EVIDENCED BY A PROMISSORY NOTE, BUT THE AGGREGATE OF THE LOAN IS TREATED AS ONE ACCOUNT AND IS REPAYABLE AT ANY TIME BY THE BORROWER AND THE SUM OF MONEY IS REQUIRED BY THE LENDER AND PAID BY THE BORROWER FOR THE EXTENSION OF THIS LUMP SUM IN EXCESS OF 42% PER YEAR, IS THE CONTRACT FOR THE PAYMENT OF INTEREST VOID UNDER SECTIONS 7, 8736 AND 8734, REVISED LAWS OF HAWAII 1945?

At all times covered by the transactions set forth in this action, Plaintiff has been a licensed money-lender under the provisions of the Laws of Hawaii; first, as a licensed money-lender; then, the licensee under the Industrial Loan Act and now under the law of 1939. Uniformly, all of the licensing Acts called for a one per cent per month limitation on the interest which might be charged by a licensee, and provided criminal penalties for the licensee who exceed the rate provided. In 1937, the general usury statute making criminal the charging of excess interest (Section 7055

Revised Laws of Hawaii 1935) was amended to reduce the legal rate of interest that could be charged in the Territory to one per cent, under criminal penalties.

“Since 1905, when the first criminal usury statute was enacted, the taking of interest at a rate greater than two per cent per month has been prohibited and is punishable by fine and imprisonment. (§ 7055.) By Act 222 (D-150), effective May 15, 1937, amending Section 7055, the two per cent maximum was changed to one per cent.”

36 *Hawaii* 108.

“*Devices to Conceal Usury*—The cupidity of lenders, and the willingness of borrowers to concede whatever may be demanded or to promise whatever may be exacted in order to obtain temporary relief from financial embarrassment, as would naturally be expected, have resulted in a great variety of devices to evade the usury laws; and to frustrate such evasions the courts have been compelled to look beyond the form of a transaction to its substance, and they have laid it down as an inflexible rule that the mere form is immaterial, but that it is the substance which must be considered. No case is to be judged by what the parties appear to be or represent themselves to be doing, but by the transaction as disclosed by the whole evidence, and if from that it is in substance a receiving or contracting for the receiving of usurious interest for a loan or forbearance of money, the parties are subject to the statutory consequences, no matter what device they may have employed to conceal the true character of their dealings. Every species of contrivance in the modification of any loan or contract,

for the purpose of evading the statute, being cases within the mischief, are also within the remedy. Usury is a moral taint wherever it exists, and no subterfuge shall be permitted to conceal it from the eye of the law; this is the substance of all the cases, and they only vary as they follow the detours through which they have had to pursue the money lender. Though the principle stated above may be extracted from all the cases, yet as each depends on its own circumstances, and those circumstances are almost infinitely varied, it is not surprising if there should be some seeming conflict in the application of the rule by different judges. Different minds allow a different degree of weight to the same circumstances. A distinction has been drawn between cases wherein a transaction is given a certain form to cover usury and wherein it is given that form to escape usury. In the latter instance, it is insisted, the transaction is not usurious, as parties have a perfect right to deal with each other with the usury laws before their eyes, and so to shape the transaction as to avoid the condemnation of those laws."

27 *R.C.L.* p. 211, par. 12.

"Continuous dealing as single transaction. A contract for continuous dealing consisting of advancements made on such security as is offered from time to time is one continuous transaction of lending or advancing money secured by successive pledges of assigned paper and not a separate transaction as to each note, even though the pledgor has the right to take up or replace any note separately."

66 *C. J.* 173, par. 61.

"Contracts Shown to Be Usurious Construed Strongly Against Lender. Since the penalties of

the usury laws are all directed against the lender, and intended for the protection of the borrower, contracts shown to be usurious are construed strongly against the lender.”

66 *C. J.* 173, par. 62.

The arrangement for financing Mr. Carey's business was made by one, Hugh Copper Tennent, who, at the time, was the auditor for Mr. Carey's business and also the auditor of the business of the Plaintiff herein. (See page 20 of the Transcript.)

“Q. Have you acted as, all during the course of this account as auditor for both companies?

A. Right up to 1939 I have acted as auditor for both parties.

Q. Will you state to the court what the arrangement was for the lending of money?

A. The arrangement was that Mr. Carey should borrow a subsequent sum a month with interest deducted which would give him the cash that he needed to finance his business in Hilo.”

Transcript page 23.

By this contract, as shown by the testimony, collateral in the form of partial payment sewing machine contracts, was deposited as a mass security for all the transactions. As these sewing machine contracts were paid off, substitution was made by other contracts. All of the collateral being equal security for any part of the whole loan or transaction. There can be no question that this is a loan transaction, as distinguished from the case of *Commercial Security Company v. Holcombe*, 262 Federal Reporter 657, in which case the transactions, varying a little from the present,

were held to be loans, and it was held that the entire transaction was a single contract, to be considered as a whole in dealing with the question of usury, 262 Federal Reporter 663. The same question arises in *Dorothy v. Commonwealth Commercial Company, L. R. A., 1917-E* in which the defense of usury is applied to a series of transactions, all interconnected by one agreement to finance, in which the Court says:

“In *Cobe v. Guyer*, 237 Ill. 568, 86 N. E. 1088, we said: ‘So long as any part of the original debt remains unpaid the debtor may insist upon the deduction of the usury (*Payne v. Newcomb*, 100 Ill. 611, 39 Am. Rep. 69; *Jenkins v. International Bank*, 97 Ill. 568; *House v. Davis*, 60 Ill. 367); and only the balance of the principal remaining after the application on the principal of all payments, whether of principal or interest, can be recovered (*Harris v. Bressler*, 119 Ill. 467, 10 N. E. 188). No form which can be given to a contract, no device by which a new form is given to an old transaction tainted with usury, and no mere substitution of securities, will avail to cut off the defense of usury. *Hunter v. Hatch*, 45 Ill. 178; *Nickerson v. Babcock*, 23 Ill. 561.’ ”

L. R. A., 1917-E, page 1121.

As the present transaction was conducted the installments due were not by the execution of new notes, which, when the series reached a total of 13 notes, brought nothing to the maker, and with the 14th and 15th note required the payment of additional cash to extend the loan an additional 30 days. This additional cash for the 30 days extension of the loan was the profit of the lender on the amount then due. If the

interest charged was usurious, the amount due at any time, under the law, was the base cash total received by the borrower, and the percentage of profit on the transaction is the ratio of the charge for extension to the amount which would legally satisfy the obligation.

“Q. The next question and answer: ‘The Hilo Finance & Thrift Company agreed to lend \$67,000 over a period of time against contracts which were contracted for on the Island of Hawaii.’ Now did you make that statement or not?

A. It is in the transcript. I imagine that is what I said.

Q. And wasn’t that the agreement?

A. The agreement was to borrow monthly certain sums. The limit of the outstanding balances was determined by the first agreement. Now, if they reached . . . I can’t put my hand on . . .

Q. Well, you stated here they agreed to lend this amount, is that true or is it?

A. They agreed to lend \$1165 a month providing he put up sufficient collateral for recovery.

Q. Was there any agreement by the Hilo Finance & Thrift Company to lend \$67,000 over a period of time against contracts which were contracted on the Island of Hawaii?

A. I think that is putting a wrong connection on it. These loans went on for month after month amounting to \$67,000. I assume . . . I haven’t the figures before me but that looks like the right figure.

Q. Well, you certainly wouldn’t state under oath, Mr. Tennent, that they agreed to loan this sum if that wasn’t true?

Mr. Cades: I object, he can correct it, ask him and he can answer it.

The Court: Yes, that is right.

Q. Well, did you make this statement?

A. I assume if the statement is there.

Q. Lets read it then right there. (Giving the witness the transcript.)

A. Mr. Carey presented a budget which provided for borrowing so much every month and provided for repayment. Now, the total amount of the borrowings that appeared on the budget would not be that amount. That is, he would borrow monthly that amount or approximate. That is a round figure and not that I had any figures in front of me to state. The figure may be over \$10,000 and so on. The arrangement was to borrow so much a month and to pay so much a month but when I stated here that the amount under the first arrangement was that he wouldn't be indebted to ~~that~~ company in any month over a certain amount which Mr. Carey had collateral put up."

Transcript pages 36-37.

"Q. Would a series of computations on a note for \$1165 in which the payments run out in 13 payments, on the 14th note?

A. On the 14th note.

Q. Thereafter the man got no more money for any extensions that he borrowed?

A. Yes, he continued therein on that basis.

Q. Now, in the actual transaction with Mr. Carey, was there a time in this general loan agreement when that situation in fact existed that he had borrowed so much money on notes that he could no longer borrow on the same kind of notes without putting in additional money or repaying some of those notes?

A. I think you will find that once or twice that condition went along.

Q. For several months or year or more?

A. Three or fours months I imagine.

Q. And that at the end of that period or at the time when this last note was due and Mr. Carey had to borrow this money, as you say he did, he could have wiped out the entire borrowing by paying off all installments that were then due or that were represented on the note, could he not?

A. I don't quite understand the question. You mean he could have wiped out the \$6942.

Q. If he brought that into the office yes, plus the interest that had been charged on the note into the office, he could have wiped out the entire account, could he not?

A. Yes, of course if he brought the money in, sufficient money in to pay it."

Transcript pages 126-127.

Now as to the manner that this agreement was carried out, testimony of Mr. Tennent beginning on page 38 which reads as follows:

"Q. And you know, do you not that in the commencement of the borrowing from the Hilo Finance & Thrift Company that a note for \$2330 was executed of which \$2000 was turned over to Mr. Carey, \$330 was retained as pre-paid interest. You know that, do you not?

A. As interest deductible in advance on \$2330.

Q. Call it what you will. And then the succeeding notes were used, were they not, first they deducted the interest in advance, second, they

paid the first installment due on the first note, that is the second note.”

* * * * *

“Q. And then the third note, the same deduction of interest was made and there was another deduction of two installments that is one of them due on the first note and then one due on the second note. They were applied to those two notes, is that correct?

A. That was not the universal case but that is the frequent case.

Q. And you say that is not universal. That is, there was notes was there not thereafter which the whole amount of cash was turned over to Carey?

A. Yes.

Q. That is what you mean by the exceptions?

A. Mr. Carey wanted additional money he asked for all the cash. On occasion when Mr. Carey had funds he paid the notes that were due.

Q. And now, Mr. Tennent, there was a period where there were fifteen of these \$2330 notes outstanding?

A. Yes.

Q. Where a new note would be executed and the entire amount of that note plus \$330 in cash which was paid by Mr. Carey to the Plaintiff which were used to meet the installments due on the 15 prior notes?

A. On the level \$2330 which is usually the note after deducting interest, the balance in many cases was applied on other notes.

Q. And if there was 15 notes outstanding would payment on each note, each month was \$155.32 and 15 times that equals \$2330?

A. Yes, with a few cents difference.

Q. So that when 15 notes were outstanding and monthly installments were due, the execution of a new note of like amount because of the deduction of \$330 interest paid in advance was \$330 short of the amount needed to meet those installments?

A. Yes."

* * * * *

"Q. He has figured out the figures here that appear, that on the first month the defendant would get \$1000, second month he would get \$922.34, the third month \$844.68, fourth month \$767.02, fifth month \$689.36, sixth month \$611.70, seventh month \$534.04, 8th month \$456.38, 9th month \$378.72, tenth month \$301.06; 11th month \$223.40, twelfth month \$145.74, 13th month \$68.08, nothing the 14th or nothing the 15th.

A. Except the 15th he gets the rebate coming in.

Q. That is rebate start coming in on the first note?

Mr. Cades. We would be willing to stipulate that that is mathematically correct.

Q. All right, now if he doesn't pay these notes on their due date then he isn't entitled to the rebate, is he?

A. According to the practice done here in Hilo, which is not too strictly interpreted but under the contract he was not entitled."

Transcript pages 38-39-34.

Thereafter, Mr. Tennent computed in Court:

“Q. Showing a total of the amount which would be received under a series of notes like this one would be \$6,942.52?

A. Yes, sir.”

Transcript page 44.

Mr. Tennent testified that the complaint on the question of interest and how interest could be computed; he testified that at the end of 13 months on a series of notes, where each note was used to pay the installments due on preceding notes, and the amount of interest was that charged in the notes now in question, the borrower would receive nothing. Thereafter, if he wished to keep his account fresh he would have to renew by putting in another note and paying the installment on the note then due, that on the 13th note the borrower would receive \$68.08. It is easily understandable when we say that \$165.00 of prepaid interest covers two installments in the notes so that when all but two of the notes had been paid, there was one-half of the prepaid interest to be paid to renew the 14th note and when the 15th note became due there were two installments to be paid, and thereafter, each month to renew and keep the obligation stable the whole of the prepaid interest for the 14th and 15th months installments had to be paid in cash in addition to the execution of a similar note. On page 64, Mr. Tennent shows how when this situation arrives the borrower will have the use of the principal sum of money advanced to him, and, for the time that he had the use of that money, he would have paid 41%, which arrives within a fraction of a

per cent of the figure by computing the whole amount borrowed and received by the borrower, \$6,942.52 and determining the amount then necessary to carry that amount forward one month; which figures out approximately 42%. Approaching the same problem by methods of his own, Mr. Tennent arrived at a result of 34% (page 53 of the trans.), (34% on page 51 of the trans.), 28.5% on page 45 of the trans.), which is the lowest figure that Mr. Tennent could supply in any way that these loans were being paid for. Previous to that, without any figures, he testified that the rate was less than 24% slightly. Thereafter, he told Mr. Carey, when he was acting as Mr. Carey's auditor, that he was paying 16% for his loan if Mr. Carey took advantage of the entire discounts or rebates to be allowed him.

At no time in his testimony (and I might say, the entire case of the Plaintiff rests on Mr. Tennent) was there any pretense that at any time that it was the intention of the lender to abide by the one per cent rate provided by law. The Trial Judge found that the rate computed strictly on the notes themselves was slightly over 24%.

This case differs from *Carey v. Discount Corporation*, 36 Hawaii 107, in that the usury law violation by the lender in this case was in violation of the criminal statute from the start. There never was a time when the Plaintiff in this case, as a licensed money lender, was authorized by law to charge more than one per cent a month. When he was licensed he put himself under the provisions of the Money-

lender's Act which provided criminal penalties for charging in excess of that amount. Plaintiff in this case does not contend for a moment that the interest rate charged on his loan had been less than 23%; Mr. Tennent said that it is slightly below 24%. He told Carey that when Carey got that third discount on his interest, his effective rate was 17% which makes 24% plus the actual rate charged when the computation was made on the face of the note and not made upon the basis of payments for monthly renewal.

It is obvious that the difference in the rate of interest consists in the fact that the monthly renewal not only prepaid a new note at the rate of 24% but also compounded the interest on the other notes which accounts for the rate of 41 to 42 per cent at which the charge actually figures out.

Section 7 of the Revised Laws of Hawaii, says that which is prohibited is void. In adjudicating the Carey v. Discount case, in 36 Hawaii at page 126, the Court distinguishes that case from cases in which the criminal usury statute or a criminal statute is plead as a reason for declaring the payment on the contract for the payment of interest void.

The contract which in inception is void, illegal and contrary to public policy is distinguishable from the contract on which the borrower has a *defense* of usury which *defense* could be taken from him. If the contract to pay interest was void, there can be no power in the legislature which could at any time thereafter give it validity.

2. WHERE NOTES ON THEIR FACE CALL FOR THE MAXIMUM RATE OF LEGAL INTEREST, WITH INTEREST DEDUCTED IN ADVANCE TO MATURITY, AND THE NOTES CONTAIN AN ACCELERATION CLAUSE AUTOMATICALLY ENFORCING THE PENALTY WITHOUT RETURN OF THE INTEREST DEDUCTED IN ADVANCE, WHICH MAY CAUSE THE ENTIRE DEDUCTED INTEREST TO BE APPLIED FOR THE USE OF THE BORROWER'S MONEY FOR A MINOR FRACTION OF THE MATURITY DATE, IS THE CONTRACT PRIMA FACIE USURIOUS?

The contracts shown to be usurious are construed most strongly against the lender.

“Contracts Shown to Be Usurious Construed Strongly Against Lender. Since the penalties of the usury laws are all directed against the lender, and intended for the protection of the borrower, contracts shown to be usurious are construed strongly against the lender.

As of What Time Character of Contract Determined. The character of a contract with respect to usury is determined as of the time it is made. To be usurious the contract must be so in the beginning; if it is then legal it cannot be rendered usurious by subsequent transactions. This rule of construction finds its most frequent application in those numerous cases in which it is held that, when a person agrees to pay a sum of money by a certain date, and thereafter more than the legal rate of interest if the debt be not punctually paid, such an agreement is not usurious, even though excessive payments actually made under the agreement may be usurious.”

66 *C. J.*, pages 173-174, paragraphs 62 and 63.

In *Helbush v. Mitchell*, 34 Hawaii at page 643, the Court said “Statutory licensees possess only such

powers as are expressly conferred or necessarily implied.”

The notes in this case are peculiar; the acceleration clause is not at the option of the holder, but the note becomes absolutely due and payable upon default of any of the payments without the exercise of any discretion at all upon the part of any person involved.

“Necessity; General Rules for Determination.
—To constitute usury, it is of course essential that an excess of the legal maximum be exacted in consideration of the loan or forbearance. By this is meant an excess of the maximum prescribed by statute. Though there is authority to the contrary, it does not seem requisite that an excess be payable in any event. On the contrary a contract is usurious when there is any contingency by which the lender may get more than the lawful rate of interest, whether it is so apparent that it becomes the duty of the Court so to declare, or whether it is a case in which it is necessary that the jury should find the facts. Usury, it is considered, does not depend on the question whether the lender actually gets more than the legal rate of interest or not; but on whether there was a purpose in his mind to make more than legal interest for the use of money, and whether, by the terms of the transaction, and the means used to effect the loan, he may by its enforcement be enabled to get more than the legal rate. Consonant with this doctrine it has been held that a contract for the loan of money at the legal rate of interest, but in case the debtor’s business succeeds the rate to be paid

by him to be much in excess of that rate, is a usurious contract. Usury may exist even though interest is paid not in money but by services or in commodities. So where a slave was pledged as security for a loan, the lender to have the use of the slave for interest, the contract was held usurious, the value of the slave's services being in excess of legal interest on the sum advanced. The extent of the advantage, or the amount of the surplus in excess of legal interest is wholly inconsequential on the question of usury. Furthermore, to constitute usury it is not necessary that the maximum laid down in the general statute against usury be exceeded. It suffices if more than the maximum allowable under a special statute applicable to the case be exacted. When a bank reserves greater interest than its charter allows, the usury laws apply to the contract, although the rate does not exceed the rate prescribed thereby."

27 *R.C.L.* page 223, Paragraph 24.

The notes themselves include the interest for the full term deducted in advance and the claim in this action is for the whole of the balance due upon the face value of the note with the claim that they were defaulted some time prior to the due date. In other words, the default was charged in 1938, at which time a certain amount of the interest which had been deducted in advance, if it were legal, had been earned. The claim of the whole balance as existed at the time of the default is the claim for not only the earned interest which was the actual extreme legal limit under the law, but also was the claim for the unearned

interest which makes the profit to the lender very much in excess of the legal profit which might be exacted by a licensed money lender.

That this effect was anticipated by the lender cannot be doubted. This is especially true because the property pledged for the whole series of notes or the lending contract secured each of the notes, so that, if a default on the last payment of one of these notes was entered, the lender was authorized to sell out the whole of the security of all the notes, thus defaulting the rest of the notes and causing the maturity date to be accelerated.

These notes must be distinguished from those in which the power to declare a forfeiture is optional with the holder. When that is the case, the enforcement of the penalty is optional with the holder. At the inception it may be said the holder had no intention of enforcing a harsh penalty, and the harsh penalty was not absolutely provided in the note hence the notes were not usurious. Here, however, is just the reverse of that case. These notes became due without any option on the part of anybody on the default of the slightest of the requirements of the instrument itself.

The intention of the legislature that a loan company should not be allowed to profit to the extent of usury by an acceleration of the loan is shown in the Industrial Loan and Investment Law, Session Laws of Hawaii 1939, page 258, Section 6, which reads as follows:

“On a contract which has been discounted or on which interest has been collected in advance, and which is then paid or refinanced or on which judgment is then obtained before maturity, the industrial loan company involved shall refund to the borrower on account of unearned discount or interest an amount computed, on that portion of the principal amount which has not yet matured, at the same rate of discount or interest as was charged, at the time the contract was made, for the term of such contract remaining after the date of such payment or after the date of such judgment; provided, that no refund less than 25 cents need be made. Each company shall permit any borrower from it to pay partially or wholly any contract or installment on a contract prior to the due date, if such contract has been in effect for a period of at least three months.”

Session Laws of Hawaii, 1939, Section 6, p. 258.

It is thus evident that on all of these notes which became due by acceleration on the day which the complaint says there was a failure to pay an installment, it was the duty of the loan company to refund or to give credit for the unused portion of the interest. To claim the whole unearned prepaid interest and to begin an action based upon that claim, constitutes usury, putting the loan company wholly without the benefit of any protection that the amendment of 1939 might have given them, and this result is obvious from the note itself and the peculiar wording of the acceleration clause.

When there is a series of 15 notes, payable in 15 equal installments, one-half of the installments have

been paid and one-half remains unpaid. This situation remains as long as the oldest note is renewed by the execution of a new note. It is obvious that the acceleration of due date in that condition finds one-half of the interest deducted in advance unearned. When an attempt is made to collect the face of the note at that time the rate of interest for the period of use of the money is doubled. If these notes require a normal 24% interest if paid at maturity, the rate is 48% at the acceleration date. The attempt to collect this unearned interest is in disregard of all usury laws and in violation of the amendment of 1939 to the Industrial Loan Act.

3. WHERE NOTES IN ACCORDANCE WITH THEIR TERMS ARE ACCELERATED INSTANTLY UPON DEFAULT WITHOUT THE OPTION OF THE HOLDER AND, IN 1938, THE PAYEE OF THE NOTE REFUSES ALL FURTHER PAYMENT AND CLAIMS THE APPLICATION OF USURIOUS INTEREST TO THE EXTINGUISHMENT OF ALL BALANCES THEN OUTSTANDING ON THE NOTES OR LOAN, ARE THE NOTES AND THE LOAN SO EXTINGUISHED AS OF THAT DATE THAT THE LEGISLATURE OF 1939 COULD NOT REVIVE A DEBT BETWEEN THE LOANER AND THE BORROWER?

“A vested right may also be defined as the power to perform certain actions or possess certain things lawfully and is substantially a property right. When a right has arisen upon a contract or transaction in the nature of a contract, authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, it has become vested and the repeal of the statute does not affect it or an action for its enforcement.”

“*The repeal of a law* which is, in its nature, a contract, cannot divest vested rights which have been established under that statute. *Poin-dexter v. Greenhow*, 114 U. S. 270, 29 L. ed. 185, 5 S. Ct. 903, 962.”

11 American Jurisprudence, page 1199.

“* * * A repeal or amendment of a statute, however, cannot have the effect of extinguishing vested rights which have been acquired under the former law.”

11 Am. Jur., page 1201.

“* * * Illustrations abound of defenses which are clearly substantial and of which a party cannot be deprived. A man who has a demand which has been actually satisfied clearly cannot be required to meet it again by having it revived against him * * *”

11 Am. Jur., page 1207.

This case is to be distinguished from cases in which there is an existing obligation to which a defense of usury might be heard. Section 7053 provided that the right of action might be extinguished by the application of usurious interest to the principal, where it has been paid. The mere existence of the notes, which are evidences of this debt and not the contract debt itself, does not keep alive a cause of action which once has been extinguished. It must be remembered that the Defendant in this action exercised his right to extinguish these obligations by his affirmative action in refusing to pay further after having paid in sufficient to clear the money advanced by the applica-

tion of his payments. The plea in defense is a plea of payment, not a plea of usury in bar of collection. Hence, the satisfaction of this obligation by the application of the payments was sufficient to give Carey a vested right to the satisfaction of his obligation.

The right of the legislature to repeal or change the statute in regard to usury is similar to the right of the legislature to change or extend the statute of limitations. There is no question but that the statute of limitations may be extended as to an existing obligation so also the statute might be extended or changed as to the defense of usury, limited, however, to those cases where there was a subsisting obligation. Where the effect of the legislation is to create out of the blue sky an obligation which did not exist or which has been fully satisfied, the power does not exist in the legislature.

“When the period prescribed by the statute of limitations has once run, so as to cut off the remedy which one might have had for the recovery of property in the possession of another, the title to the property, irrespective of the original right, is regarded in law as vested in the possessor, who is entitled to the same protection in respect to it which the owner is entitled to in other cases. A subsequent repeal of the limitation law could not be given a retroactive effect, so as to disturb this title. It is vested as completely and perfectly and is as safe from legislative interference as it would have been if it had been perfected in the owner by grant or any species of assurance. Cooley, Const. Lim. 365.”

“Retroactive declaratory statutes will not be allowed to affect vested rights. *Lambertson v. Hogan*, 2 Pa. 22; *Haley v. Philadelphia*, 68 Pa. 45; 8 Am. Rep. 153; *McLeod v. Burroughs*, 9 Ga. 213.

A statute which, operating upon facts existing at the time of its passage, attempts to impose upon one person a debt or duty to another, where there was no right and no obligation in existence before the passage of the act, is in violation of the constitutional prohibitions. *Ryan v. State, Eller*, 5 Neb. 276; *Towle v. Eastern Railroad*, 18 N. H. 547, 47 Am. Dec. 153.”

United States Supreme Court Reports, Law Ed., 14-42, p. 96.

“It is well settled by the decisions of this Court that ‘The remedy subsisting in a State, when and where the contract is made and is to be performed, is a part of its obligation, and any subsequent law of the State which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution, and is therefore void.’ *Edwards v. Kearzey*, 96 U. S. 595, 607 (24:793, 798).

It had been previously said upon a review of the decisions of the court, in *Von Hoffman v. Quincy*, 71 U. S. 4 Wall. 535, 553 (18:403, 409): ‘It is competent for the States to change the form of the remedy, or to modify it otherwise as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy which are to be deemed legitimate and those which, under the form of

modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced the Act is within the prohibition of the Constitution, and to that extent void'.

In *Bronson v. Kinzie*, 42 U. S. 1 How. 311 (11: 143), *Chief Justice Taney* said: 'It is difficult, perhaps, to draw a line that would be applicable in all cases between legitimate alterations of the remedy and provisions which, in the form of remedy, impair the right. But it is manifest that the obligation of the contract, and the rights of a party under it, may, in effect, be destroyed by denying a remedy altogether; or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing.'

In *Louisiana v. New Orleans*, 492 U. S. 203, 206 (26:132, 133), *Mr. Justice Field*, in the opinion of the court said: 'The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced—by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened.' "

United States Supreme Court Reports, Law Ed.
29-30, p. 1165.

4. WHERE A BLANKET FINANCING CONTRACT IS ENTERED INTO BETWEEN THE PARTIES WHEREBY SUMS ARE TO BE ADVANCED UNDER THAT CONTRACT AND NOTES ARE TO BE ISSUED EVIDENCING SUCH ADVANCES, AND THE LUMP SUM WHICH IS DUE AT ANY ONE PARTICULAR TIME MAY BE PAID OFF BY THE BORROWER; AS A CONDITION OF EXTENSION OF SAID LUMP SUM FOR A PERIOD OF THIRTY (30) DAYS, LENDER MAKES A DEMAND FOR AND RECEIVES INTEREST PAYMENTS OR PAYMENTS FOR FORBEARANCE, AT A RATE OF 42% PER ANNUM OR MORE ON THE SUMS THEN DUE AND THE LENDER IS LICENSED UNDER THE INDUSTRIAL LOAN AND INVESTMENT LAW, CHAPTER 170, REVISED LAWS OF HAWAII 1945 AND THE LICENSING LAWS WHICH PRECEDED THAT ACT, IS THE LENDER UNDER THE PROTECTION OF THE SAVING CLAUSE OF THE INDUSTRIAL LOAN AND INVESTMENT LAW CONTAINED IN SECTIONS 6782-W AND 6782-X OF ACT 75, SESSION LAWS OF 1939 AS SHOWN ON PAGE 262 OF THE SESSION LAW?

The situation in this action is that contemplated in Section 7 of Section 6782-L, Session Laws of 1939 as shown on page 258. In extending a loan the interest referred to is one per cent deductible in advance for the period of the extension, that is slightly in excess of one per cent a month.

“On a contract which has been discounted or on which interest has been collected in advance, and which is then paid or refinanced or on which judgment is then obtained before maturity, the industrial loan company involved shall refund to the borrower on account of unearned discount or interest an amount computed, on that portion of the principal amount which has not yet matured, at the same rate of discount or interest as was charged, at the time the contract was made, for the term of such contract remaining after the date of such payment or after the date of such judgment; provided, that no refund less than 25

cents need be made. Each company shall permit any borrower from it to pay partially or wholly any contract or installment on a contract prior to the due date, if such contract has been in effect for a period of at least three months."

Section 7, Session Laws of 1939, page 258.

"Insofar as, and to the extent that, it lies within the power of the legislature so to enact, it is hereby provided that the defense of usury provided by Chapter 232, and particularly by section 7053, of the Revised Laws of Hawaii 1935, shall not be available to any party in any action brought upon or arising out of any note or other contract to pay or secure the payment of money heretofore made or executed to any person, firm, association or corporation as the payee or obligee of such note or contract, which payee or obligee was duly licensed under Act 154 of the Session Laws of Hawaii 1933, or under Act 231, Series D-140, of the Session Laws of Hawaii 1937, at the time of the making of such note or other contract, if such note or contract provides for, and there has been collected thereon by such payee or obligee or the holder thereof, no greater rate of amount of interest or other charges or both, than those that would have been permitted under this Act if it had been in force when such note or contract was made."

Section 2 of 6782-X p. 262, Session Laws of Hawaii, 1939.

It is apparent that the protection given by the Session Laws of 1939, if any protection was given at all by the legislature, does not extend to anyone who,

in the course of his business, exacted more than one per cent per month for the extension of the loan, regardless of the means of evasion of the law attempted by the lender. All of these notes are extension notes, extending the loan in due process by the payments of the reserved interest for the period of a month for which the extension should apply. According to Tennent, the cheapest rate which can be figured on these loans was 14.1%. That is the rate which he estimates Carey could have this loan, if all of the rebates were allowed and there had been prompt performance by Carey. He told Carey under the same circumstances the interest rate was 16%; either 14 or 16 per cent is more than the one per cent allowed by the statute, even deductible in advance, and without these so-called rebates Tennent said that the rate was just below 24%. The Court finds that the rate was just above 24% in accordance with the terms of the note. In accordance with the process of renewal, Tennent says, the interest rate is 28%, 34% or 42%, and in consideration of the fact that the notes were defaulted with 50% of the interest unearned Tennent's rate becomes 48%, 68%, and 94%. Session Laws of Hawaii 1939 provides a saving clause which permits people who loaned money under rates which are now permissible to purge their loan of usury. Under these circumstances, where there was no attempt at all to stay within the usury limits, and where the actual charge was way in excess of any rate permitted by the Sessions Laws of 1939, it is far beyond the intention of the legislature to provide relief.

The power of the legislature in changing the usury law, and in extending the period of the statute of limitations, is always and in all decisions qualified to the application of the amendment to existing contract.

“Independent of the nature of the forfeiture as a penalty, which is taken away by a repeal of such a statute, the more general and deeper principle on which they are to be supported is, that the right of a defendant to avoid his contract is given to him by statute, for purposes of its own, and not because it affects the merits of his obligation; and that, whatever the statute gives, under such circumstances, *as long as it remains in fieri, and not realized, by having passed into a completed transaction*, may by a subsequent statute be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere in the contract.”

6 R.C.L. 351.

The contract in this case was the general contract to loan money, that contract has been fully satisfied under the terms of the existing law. It is to be distinguished from the “*evidence*” of the contract which still is in existence, that “*evidence*” of the contract will exist as long as ink can be read on paper and the papers themselves are in existence. A promissory note for a preexisting debt is mere evidence of that debt. It neither extinguishes the pre-existing debt, nor does it add to its binding effect. The existence of these pieces of paper does not make this an existing contract. The contract itself was extinguished in 1938 when Carey acting upon the ruling of this Honorable

Court in the case of *Helbush v. Mitchell*, determined that he would no longer pay, and refused to regard himself as the debtor of the Plaintiff in this case. As a matter no longer in existence as a contract or obligation, the constitutionality of the 1939 Session Laws regarding "existing" contracts is not in question. In the case before the Court, the whole question is, whether or not contracts which have been wholly extinguished under the provisions of the law as it existed prior to 1939 may be reimposed by the Territorial Legislature upon the debtors.

5. DOES THE LEGISLATURE OF HAWAII HAVE THE POWER TO REVIVE A CONTRACT FOR THE PAYMENT OF MONEY WHICH BY THE TERMS OF PRECEDING LAWS HAD BEEN FULLY SATISFIED AND EXTINGUISHED BETWEEN THE PARTIES BY THE APPLICATION OF USURIOUS INTEREST UNDER THE TERMS OF SECTION 7053, REVISED LAWS OF HAWAII 1935, AND SECTION 8816, REVISED LAWS OF HAWAII 1945?

The principles involved in this question have all been discussed in the discussion of preceding questions of law, and the argument on this question is based upon the argument set forth above without repetition.

G. CONCLUSION.

We have here an unconscionable loan made with the full intent that the one per cent limitation upon money lenders should be evaded. Usurious contracts are interpreted on the terms contained in the documents relating to their enforcement.

The amount of interest charged is that which a strict enforcement of the contract by the usury would bring him as a profit. So-called rebates depending on whim or the charity in the heart of the loan shark do not purge the usurious contract of usury. This is particularly so where, as in the present case, there is an action in law to collect the full amount claimed to be due under the usurious contract.

There was a process contained in the repealing act by which the usurer might have attempted to purge himself, but which has not been used. Carey has paid the whole of the money advanced to him; he has also paid a sum in excess of \$6,000.00 on interest for that loan. He is entitled to rest upon the decision in *Helbush v. Mitchell* that he could apply all of his payments to the satisfaction of his legal and moral obligation to return the principal. He never was required to go into Court to secure the application of the payments under the terms of that Decision and the law upon which it was based. His debt has been paid and he is entitled to a clearance from this Court.

Dated: Honolulu, T. H.,

April 30, 1945.

Respectfully submitted,

GEORGE B. CAREY,

Defendant-Appellant.

By—CASS & SILVER,

Attorneys.

By.....

Phil Cass.

No. 11,703

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

GEORGE B. CAREY,

Appellant,

vs.

HILO FINANCE & THRIFT CO., LTD.,
a corporation,

Appellee.

Upon Appeal from the Supreme Court of the
Territory of Hawaii.

BRIEF FOR APPELLEE.

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No. 11,703

IN THE
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GEORGE B. CAREY,

Appellant,

vs.

HULO FINANCE & THRIFT CO., LTD.,
a corporation,

Appellee.

Upon Appeal from the Supreme Court of the
Territory of Hawaii.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

This is an appeal pursuant to Section 128 of the Judicial Code, amended (28 U.S.C. 225) from a final decision and judgment of the Supreme Court of Hawaii (R. 297, 309). The value in controversy, exclusive of interest and costs, exceeds \$5,000.00 (R. 297); judgment of the Supreme Court was entered on April 30, 1947 (R. 309); petition for a rehearing was denied on May 1, 1947 (R. 312); appeal was filed on June 19, 1947 (R. 313).

STATEMENT OF THE CASE.

The appellant's statement of the case is such a mixture of contention, legal theory and disputed fact that appellee believes it necessary to present a fair and concise statement of facts as found by the trial court and the Supreme Court. For convenience following appellant's brief, appellant is referred to throughout as "defendant" and appellee as "plaintiff".

(a) Summary statement of facts.

This is an action to recover the sum of \$4,971.84 on eight promissory notes. The defendant interposed the defense of usury, and counterclaimed for interest paid on thirty-eight fully paid promissory notes in the amount of \$6,188.62. A judgment for the plaintiff as prayed for and dismissing the counterclaim was affirmed by the Supreme Court from which the defendant appeals.

The plaintiff is a corporation duly licensed as an "industrial loan and investment company" under the provisions of Act 231 (Series D-140, Session Laws of Hawaii 1937) (R. 55). The corporation had originally been licensed as "money lender" under the provisions of Act 154, Session Laws of Hawaii 1933, which statute was repealed and superseded by said Act 231. The defendant, as an individual, engaged in business in selling sewing machines under conditional sales contracts to purchasers throughout the Territory. The defendant required substantial financial assistance in his business (R. 138, 300) and borrowed money from the plaintiff under terms conforming generally to

those covering loans made by the plaintiff in its business (such rates and terms being on file in the office of the Bank Examiner) and conforming to the terms of loans made by industrial loan companies operating generally throughout the Territory (R. 63, 251). The court below accurately characterized the relationship between the parties as follows: "In 1934, preliminary to entry into the relationship, the parties had an oral understanding that the defendant upon an estimate of his business needs for money would, from time to time, apply for a loan when he had sufficient sale contracts of his customers to offer as collateral security; that the plaintiff, if it accepted the application, would make the loan deducting interest in advance; that execution of the contract would be upon plaintiff's printed form of installment promissory note; that plaintiff to accommodate defendant would extend the ordinary period of one year to that of fifteen months and agree to make substantial rebates of interest for prompt payment of monthly principal installments. This understanding did not look forward to a single loan to be repaid by serial notes, nor did it regard prospective loans as one transaction or as a running or open account, but rather as distinct undertakings and different contracts to be settled and closed separately, each being one into which both parties would be free to enter." (R. 300-301.)

It is clear as found by the courts below that there was no agreement or contract under the terms of which defendant was required to borrow money from the plaintiff (R. 301) and at any time the defendant

had the option of paying off his indebtedness and of terminating his dealings with the plaintiff (R. 140, 301). In accordance with the practice in the industry legalized by statute, loans were in fact made from time to time in an amount sufficient to enable interest charges to be deducted in advance (R. 64, 250) and such deductions of interest were made at the rate of less than 1% per month, computed on the face amount of the note and provisions were made in each note for repayment of the loan in fifteen equal installments. Thus, on a loan of \$2,330.00 payable over a period of fifteen months on which, under the statute as administered by the Bank Examiner and construed by the Supreme Court (R. 250, 305), the plaintiff was entitled to deduct 15% in advance, or \$349.50. The actual amount deducted was \$330.00, and in addition, if the note was paid promptly, a rebate of interest was made by the plaintiff to the defendant equal to one-third or one-fourth of the prepaid interest (R. 61, 199-225), so that defendant paid substantially less than the charges permitted to be made and the rates approved by the Bank Examiner pursuant to the statute. The amount of the rebate varied from time to time (R. 199-225). In some cases a portion of the proceeds of the loan were used for the purpose of paying other obligations of the defendant to the plaintiff; in other cases a portion of the proceeds of a loan were used to pay obligations of the defendant to persons to whom the defendant was indebted; and in still other cases, the proceeds of the loan were used to pay prior obligations of the defendant and a portion paid

to the defendant in cash (R. 199-233). The money was applied either as directed or consented to by the defendant who was carrying on an expanding profitable business (R. 129-130, 141, 144, 147). It was stipulated at the trial that with respect to each loan made by the plaintiff, *interest was deducted in advance*, and by stipulation of the parties, detailed statements of the loans made by the plaintiff and the payments made by the defendant on each loan were received in evidence (R. 22, 25, 191, 194, 199-231). These exhibits support with mathematical certainty the findings made by the Supreme Court that "as a matter of law and fact none of the notes or combination thereof is infected with usury, nor is any violative of either the criminal or civil statutes on usury". (R. 305.)

Defendant attempts in his brief as he did in the Supreme Court (Appellant's Br., Appendix II) to place on the series of loans made, an ingenious, but factually unsupported interpretation for the purpose of showing that the loans taken as an entirety violated the usury statutes under an interpretation of the statutes, which the highest court of the Territory refused.

(b) Summary statement of statutory background.

Usury in Hawaii is purely a matter of statutory restriction, *Helbush v. Mitchell*, 34 Haw. 639.

Until 1933 there were no regulatory statutes in Hawaii relating to money lenders (other than licensed pawn brokers). Under the provisions of Act

154 of the Session Laws of Hawaii 1933,¹ a general regulation was provided for persons who obtained licenses as money lenders. This act was repealed and superseded by Act 231, Session Laws of Hawaii 1937,¹ known as the "Industrial Loan and Investment Company Law".² The 1937 act was substantially modified and clarified by Act 75, Session Laws of Hawaii 1939. The administration of the 1933 Act and the 1937 Act, as amended by the 1939 Act was entrusted to and has at all times remained with the Bank Examiner of the Territory of Hawaii. Under the 1937 Act, the Bank Examiner was empowered to issue licenses after being satisfied with the showing made by the applicant (Sec. 6782-E); was directed to receive periodical reports and statements of statutory licensees (Sec. 6782-X); and was required to make periodical examinations of such licensees for the purpose of ascertaining whether the provisions "*particularly as to interest and other charges*" were being complied with (Sec. 6782-CC).

The testimony of the Bank Examiner discloses that approximately 80 licenses were issued under the 1933 Act (R. 246) and that substantially all licensees were making charges in the manner adopted by the plaintiff (R. 251), and that unless finance companies were permitted to deduct interest in advance in the man-

¹These Acts, for brevity where the context is clear, will be referred to hereinafter as the "1933 Act", the "1937 Act" and the "1939 Act", respectively.

²The Act is known as "The Industrial Loan and Investment Act" (Sec. 6782, M-M) and the statutory licensees are called "Industrial Loan and Investment Companies" in the 1937 Act. In the 1939 Act the title was shortened to "Industrial Loan Companies", which title is used for convenience throughout this brief.

ner provided by statute, finance companies could not operate profitably (R. 258-259); that finance companies licensed under the 1933 Act and the 1937 Act were an absolute need in the community; that the Bank Examiner's department was fully informed as to the rates that were being charged, and that by granting licenses, it approved the charges (R. 274); that the outstanding loans of finance companies according to annual reports for recent years, show an amount in excess of \$6,000,000.00 (R. 275); and that in excess of 90% of the outstanding loans made by the finance companies provided for interest substantially as paid or charged in the case at bar (R. 276).

Helbush v. Mitchell, *supra*, was decided by the Supreme Court on October 21, 1938. This case involved a clear violation of the 1933 Act, but the Supreme Court in applying the penalty applicable to the violator of the usury law, created some doubts as to the circumstances under which a usurious contract could be purged. The Bank Examiner's Department of the Territory then prepared and sponsored the bill that became Act 75, Session Laws of Hawaii, 1939, which became effective April 22, 1939 (R. 260). By the Act, legislative approval was given to the administrative construction of the 1937 Act which had theretofore been adopted by the Bank Examiner's department (R. 260) and the Act had the effect of clarifying, so far as the legislature could constitutionally act, any and all questions with respect to the propriety of the charges theretofore made by the industrial loan companies for loans of money. This result was

achieved by the legislature providing (a) that the defense of usury shall not be available in an action brought by a statutory licensee, if the licensee has not contracted for interest at a greater rate than would have been permitted under the 1939 Act if that Act had been in force and effect at the time that the note was made (Sec. 2, Act 75, Session Laws of Hawaii 1939); (b) any statutory licensee could purge any existing loan from usury by refunding within a set period the excess above what could have been legally collected under the 1939 Act (Sec. 3, Act 75, Session Laws of Hawaii 1939); and that (c) no action shall lie against any statutory licensee under the 1933 or 1937 Acts to recover interest or charges which were legally chargeable or collectible (Sec. 4, Act 75, Session Laws of Hawaii 1939). This latter section was merely a statutory codification of the ruling adopted in *Carey v. Discount Corp.*, 36 Haw. 107, that interest voluntarily paid could not be recovered after payment on the ground of alleged usury.

(c) Decisions of the courts below.

The trial court found as a fact that the promissory notes described in the complaint were executed and delivered to the plaintiff (R. 281) and that the amount remaining unpaid on the notes were the amounts claimed in the petition (R. 282); that the defendant admitted that interest in the "sum of \$330.00 was deducted from the principal of each note on account of interest at the time the loan was made". (R. 282.)

The trial court did not consider it necessary to make any finding as to whether the interest charged was or was not in violation of the 1937 Act because under the 1939 Act the defense of usury was not available to the defendant (R. 291); that the Legislature had clear constitutional power to repeal or amend the usury laws retroactively (R. 286, et seq.); that the decision in *Carey v. Discount Corp.*, 36 Haw. 107, as well as Sec. 4 of Act 75, Session Laws of Hawaii 1939, precludes the recovery of interest already paid; that under the 1939 Act plaintiff charged no more than it was entitled to charge as a statutory licensee.

The Supreme Court held on appeal that there was "not a scintilla of evidence in the record tending to prove that the parties in contemplating loans intended to evade any provisions of the Act [the 1937 Act as amended] or any statute on usury"; that the exceptions "assigning a corrupt agreement to commit usury, are untenable and without merit" (R. 302); that at the time the notes were executed, plaintiff had full and continuing statutory authority to deduct interest in advance; that since under the 1937 Act no excessive interest had been charged, it was unnecessary to consider the effect of the 1939 Act or its constitutionality.

Peters, J., in a concurring opinion stated it was unnecessary to decide whether the notes were usurious under the 1937 Act because by the "immunizing provisions of the 1939 Act" the defendant had been foreclosed from the defense of usury.

(d) Questions presented.

1. Is the statutory construction by the Supreme Court of the Hawaiian Industrial Loan Act (Act 231, Session Laws of Hawaii, 1937) so arbitrary, unreasonable or manifestly erroneous as to warrant the interference by this court?

2. Assuming, without conceding, that the statutory construction of the 1937 Act by the Supreme Court was in error, did the Legislature of the Territory of Hawaii lack constitutional power to amend the Act and repeal the defense of usury retroactively as to licensed industrial loan companies operating under the jurisdiction of the Bank Examiner?

ARGUMENT.
I.

THE ADMINISTRATIVE AND JUDICIAL CONSTRUCTIONS OF THE TERRITORIAL INDUSTRIAL LOAN COMPANY LAW ARE REASONABLE AND PROPER AND MUST BE ACCEPTED AS STATING THE RULE OF THE TERRITORY.

The appellant's brief does nothing to clarify the matter of statutory construction. As we understand it, counsel would have this court of appeal now rule that forty statutory licensees operating in the Territory under the jurisdiction of the Bank Examiner and making charges strictly in accordance with his rulings and directions and in accordance with the statutes as construed by the highest court of appeal in the Territory were guilty of "criminal usury". To arrive at this conclusion, the appellant must ask the

court to make a completely new finding of fact on the basis of the very factual arguments rejected in the court below. While it is submitted that the opinion of the Supreme Court is unassailable, we shall show in detail hereunder why the statutory construction is reasonable and unassailable on appeal.

1. The 1937 Act has been correctly construed by the Supreme Court.

The burden of the appellant's brief is that the Supreme Court did not correctly apply the principle of *Helbush v. Mitchell, supra*, which the Supreme Court found inapplicable to the case at bar. In the case at bar, it was stipulated, and the Supreme Court found that \$330.00 was deducted from the principal of each note on account of interest "deducted in advance" (R. 304), and that the deduction did not exceed the limit fixed by Section 4 (a) of Act 154, Session Laws of Hawaii 1933, or Section 6782-N added by Act 231, Session Laws of Hawaii 1937 or by Section L-2 (a) of the amendatory Act 75, Session Laws of Hawaii 1939.³ In the *Helbush* case, *supra*, the court having found that the interest involved was not deducted in advance and was in fact in excess of the greatest amount that could have been charged; hence, for his remedy, the lender was relegated to the provisions of Section 7053, Revised Laws of Hawaii 1935 (general usury statute).

The 1937 Act by definition regulates persons, etc., "engaged in the lending of money to be repaid in

³For convenience, the provisions referred to are set out in the appendix hereto.

weekly, monthly or other periodical installments of principal sums as a business.” (Sec. 6782-A (4).)

The term “engaging in the business of an industrial loan and investment company” is defined to “mean and include the money to be repaid in weekly, monthly or other periodical installments of principal sums, and * * * the purchase or discount of installment paper from another” (Sec. 6782-A (5)).

Under the provisions of Sec. 6782-E a license is required to be obtained in order to obtain the benefits of law. It is specifically provided that no unlicensed person “shall possess or exercise, unless expressly given and possessed or exercised under other laws, any of the benefits, rights, powers or privileges which are herein conferred upon licensees hereunder”.

Under Sec. 6782-F applications for licenses must be made with the Bank Examiner showing the fitness of the applicant and also that the business will promote the convenience of the locality or community in which the business of the applicant is to be conducted.

Sec. 6782-M sets out the specific powers of licensees, including the power to make loans and “contract for such interest, discount or other consideration permitted by this chapter”.

In Sec. 6782-N the permissible rates of interest are prescribed. This section is discussed hereunder in detail.

The balance of the chapter contains detailed provisions relating to the operation of statutory licensees

and the manner in which they are permitted to conduct their business. In Sec. 6782-W the Bank Examiner is given authority with the approval of the Governor to promulgate regulations not inconsistent with law.

By Sec. 6782-X detailed reports are required to be made to the Bank Examiner and published from time to time.

By Sec. 6782-CC, the Bank Examiner is required to make examinations of statutory licensees to see whether all matters of law "and particularly as to interest and other charges are being complied with".

The provisions of the *1937 Act* relating to interest read as follows:

"Sec. 6782-N. *Rate or rates of interest.* No industrial loan and investment company, subject to the provisions of this chapter, shall directly or indirectly charge, contract for, collect or receive any interest, discount, fees, charges or other consideration on any loan or loans made by it except as provided by this section.

"Interest on loans made by any industrial loan and investment company, subject to this chapter, may be deducted in advance at the rate of but not exceeding one per centum (1%) per month, and in addition, the company may require and receive weekly, monthly or other periodical installments with the privilege to the company to declare the entire unpaid balance due and payable in the event of default in the payment of any installment. No person, firm, association, partnership or corporation (not holding a license issued

under this chapter) shall charge, contract for, collect or receive interest, discounts, fees, charges or other consideration on any loan or loans in the amount or in the manner provided in this section, unless permitted so to do by other territorial law.”

The effect of Sec. 6782-N taken with Sec. 6782-M is to grant to statutory licensees the power which non-licensees do not have, *of deducting interest in advance, and, in addition, receiving uniform weekly or monthly installments of principal*. While it is difficult to follow the appellant's contention, we infer from specifications of error Nos. 5, 6, 7, and 8 that the appellant disputes the validity of the mathematical calculations made by the Supreme Court as to permissible charges under the 1937 Act. The appellant fails to point out how the borrower could pay interest in advance and include the amount of the prepaid interest in the principal amount of the note to be repaid. The Supreme Court said: “Corroborative of the undisputed evidence * * * it is a mathematical certainty that interest at the rate of one per cent a month for fifteen months (the period of each note) on principal amounts of \$2,330.00 and \$1,165.00 would be \$349.50 and \$174.75, respectively. The interest on such loans, which in this case was actually deducted in advance in the respective amounts of \$330.00 and \$165.00, is therefore not usurious, it not being at a rate greater than one per cent per month, but rather at a lesser one.” (R. 305.)

2. The legislative background and administrative construction accord with the Supreme Court decision.

The purpose of the statute must be gathered from its four corners. It is clear that the 1937 Act had for its purpose the granting of special privileges not enjoyed by the public generally to licensees who subjected themselves to the governmental controls prescribed therein in accordance with similar practice in various states. It is also clear that any person so long as he charges no more than the interest prescribed by the General Usury Statute (Sec. 7053, Revised Laws of Hawaii 1935) can, without obtaining a license or subjecting himself to the Bank Examiner's supervision, engage in the lending of money at the rate of twelve per cent (12%) per annum.

The 1937 Act was introduced in the 1937 session of the Legislature as Senate Bill 244 and was treated as a companion bill to Senate Bill 245 which provided for the licensing of small loan companies (see Senate Journal (1937), 19th Legislature of Hawaii, p. 1066). In the report of the Senate Judiciary Committee on *Senate Bill 244*, it is stated that the companion bills had for their purpose "the setting up of a proper code under which financial institutions coming within the provisions of this Act may be properly supervised for the mutual good of the public, the companies themselves, and the Bank Examiner." (Senate Journal (1937) *loc. cit.*, *supra.*)

In the report of the House Judiciary Committee on Senate Bill 244, the Committee stated that the bill "gives to industrial loan and investment companies

the rights and privileges which are recognized throughout the mainland United States as theirs.” (House Journal (1937), 19th Legislature of Hawaii, p. 2237.)

Even a superficial review of the statutes on the mainland of the United States relating to industrial loan companies, and loan companies of similar character, shows that they have a certain general characteristic: The right is given to such companies to deduct interest in advance on the entire loan and also by the issuance of investment certificates or by direct repayments to secure the repayment of the loan in equal installments. In all the statutes examined the right is given statutory licensees to require the borrower to pay periodical installments without a reduction in the amount of interest charged by reason of such periodical repayments. See for example 1 General Laws of California 1937 (Deering) Act 3603, Secs. 1-12 relating to industrial loan companies; and statutes cited hereinafter.

It is clear from the legislative committee reports and the testimony of the Bank Examiner that the Legislature in 1937, in adopting a comprehensive code covering industrial loan companies, understood and believed that they were giving to statutory licensees the privilege of engaging in the business which particularly characterizes industrial loan companies or “Morris Plan Banks” (R. 250). The essential characteristic of the business carried on by such companies is that in one form or another interest is charged on the full amount of a loan made and the borrower is

obligated to make the repayment of periodical installments. In the trade or business in which this is conducted in Hawaii the charge is known as "block interest" as distinguished from "simple interest". An examination of such statutes of states on the mainland which have licensed "Morris Plan Banks" or "Industrial Loan Companies" reveals that all of them have the common characteristic of permitting the statutory licensees to recover block interest in one form or another. We are unable to find any statute where a statutory licensee is relegated to the General Usury Statute to determine charges that can be made for loans specifically permitted by special statute. The California statute cited *supra* permits "Industrial Loan Companies" to charge interest at the legal rate in advance, and to receive or require monthly installments on certificates of investment, with or without allowance of interest on such installments.

The Missouri statute (see 1 Rev. Stats. Mo. 1939, c. 33, art. 8, sec. 5421, p. 1308) permits "Loan and Investment Companies" under statutory license to lend money and at the same time, after deducting interest in advance at full legal rate, to require periodic installments on certificates.

The Pennsylvania statute (see 1 Laws of Pa. 1937, No. 66, sec. 13, p. 269) permits "Consumer Discount Companies" to charge, contract for, receive or collect interest on discount at a rate not to exceed six per cent (the legal rate in Pennsylvania) of the principal amount of a contract which is payable in one year by

a single payment, or is payable in equal installments amortized over a period of one year.

The Colorado statute (see 2 Colo Stats. Ann., c. 18, art. 6, sec. 153, p. 305) permits "Industrial Banks" under statutory license to collect interest at ten per cent per annum on amounts of loan and requires borrower to make periodical deposits during the period of the loan, with or without an allowance *or* interest on such deposits.

The Indiana statute (see 5 Burns Ind. Stats. Ann. 1933, Secs. 18-3103 to 18-3125, in Pocket Supplement p. 157) contains a comprehensive code for "Industrial Loan and Investment Companies" and by Sec. 18-3117 (p. 163) provides that the Department of Financial Institutions shall prescribe maximum interest rates and other charges. The rates to be adopted must be uniform throughout the state and shall be adopted after a public hearing.

The Virginia statute (see Virginia Code of 1942, Ann., T. H. 37, c. 166A, Sec. 4168 (6), p. 1494) permits "Industrial Loan Associations" to charge in advance "the legal rate of interest upon the entire amount of the loan" and to require the repayment of the loan in weekly, monthly or other periodical installments.

The Washington statute (see 1 Pierce's Code, Wash. 1939, Secs. 4691-12, p. 1055, and Secs. 4691-8, p. 1057) permits "Industrial Loan Companies" to collect interest at the rate of ten per cent per annum deducted in advance and requires the purchase of certificates

with not less than three per cent interest allowed on the certificates. Under a prior law, Laws (Wash.) of 1923, c. 172, relating to industrial loan companies, licensees could deduct interest in advance at the rate of eight per cent per annum and receive payments on certificates with or without the allowance of interest. The prior law is described in *State v. Hinkle*, 235 Pac. 359 (Wash. 1925), which states that the most characteristic function of industrial loan companies is to receive payment for the sale of written evidences of debt in installments or otherwise.

The Minnesota statute (see 1 Minn. Stats. (1941), c. 53, Sec. 53.04, p. 438) permits "Industrial Loan and Thrift Companies" to deduct interest in advance (one year interest) and requires as a condition of the loan that borrower make periodic payments for a certificate with or without interest over the period of the loan.

The Deputy Bank Examiner testified as to the legislative background of the 1937 Act and stated that it was intended to fill an economic need of the Territory and that the specific charges made by the defendant were in accordance with the uniform administrative construction of the Acts by the Bank Examiner's department (R. 248-276).

For the purpose of considering the reasonableness of the construction of the Hawaiian statute, it is not necessary that a minute examination be made of the various statutes or the rates of interest allowed in the various states in laws relating to industrial loan

companies. The essential characteristic of such companies which our legislature clearly intended to have characterize Hawaiian industrial loan companies is substantially the same: That in one form or another the licensed company can receive what is known in the business as "block interest", i.e., interest in advance with the right to receive periodical repayments in one form or another on the original principal amount—a privilege not enjoyed by unlicensed persons.

The Legislature will not be presumed to have, therefore, done a useless or futile act. As we understand it, the appellant's contention is that Sec. 7053 of the Revised Laws of Hawaii 1935 (now Sec. 8734, Revised Laws of Hawaii 1945) was applicable and that an industrial loan company could have done no more than collect twelve per cent simple interest on the declining balances of principal. It is obvious that such a construction would make the 1937 Act meaningless; first, because in the absence of express statutory prohibition (none exists in Hawaii) anyone can collect interest in advance without violating the general usury laws, and second, because in the 1937 Act it is specifically provided that no person except an industrial loan company can charge interest in the manner permitted by Sec. 6782-N "unless permitted so to do by other territorial law".

"Interest is not payable in advance unless there is a specific agreement of the parties to that effect. *One may exact interest in advance without violation of the usury laws, in the absence of*

express statutory provisions, and where the agreement of the parties declares interest 'payable in advance', or 'due in advance', such provision is to be given effect as expressing their intention in making the Contract." (Italics ours.)

30 *Am. Jur.* (Interest), Sec. 11, p. 13;

27 *R.C.L.* (Usury), Sec. 26, p. 222 and a multitude of cases cited in fn. 10.

For purposes of the general usury laws, interest deducted in advance is to be treated the same as compound interest. Thus, although by statute in Hawaii it is specifically provided that "no action shall be maintainable in any court of the Territory to recover compound interest upon any contract whatever" (see Sec. 8737, Revised Laws of Hawaii 1945) it is well established that by contract of the parties after simple interest is due, interest upon interest may be lawfully contracted for and collected.

Jones v. Wight, 8 Haw. 614, 618;

Bolte v. Akau, 8 Haw. 742, 743;

Nawahi v. Trust Co., 30 Haw. 359, 379.

In the absence, therefore, of any industrial loan statute, by specific contract interest could have been deducted in advance at the rate of twelve per cent per annum by anyone in the Territory. To hold that the Legislature by its 1937 Act did not give licensees the right to receive "block interest" in advance, *where interest is in fact deducted in advance as in the case at bar*, is to hold that the entire Industrial Loan Statute, and the prescribed system of licensing and regulation, resulted in industrial loan companies hav-

ing no privilege with respect to rates that the general public did not already enjoy. In the absence of the strong reason therefor, a court will not give a statute a construction which brings a futile or unreasonable result, nor will transactions be construed to be usurious "when it may be explained on any other hypothesis". 66 *C. J.* (Usury), pp. 172-173.⁴

We do not concede that there is any ambiguity under the 1937 Act as to the charges the licensees could make thereunder. We do not concede that *Helbush v. Mitchell*, *supra*, has any application to the case at bar, where the statutory licensee concededly deducted interest in advance, but if there is any doubt as to the meaning of the 1937 Act, under familiar and well established principles of local law (1) the contemporaneous construction placed on the Act by the administrative agency or executive department that prepared the law and was charged with its execution will not be disregarded without cogent reasons.

County of Hawaii v. Auditor, 25 Haw. 372, 377; see, also,

Frank Nichols, Ltd. v. Vanatta, 33 Haw. 602, 606;

⁴Appellant's repeated assertion that "plaintiff through its treasurer admitted that it was charging illegal interest" (see Appellant's Br. p. 10, repeated at p. 28) cannot be supported. The record page referred to (R. 133) is devoid of any admission claimed by appellant and in fact includes a statement made by appellant which was stricken from the record (R. 135) because it was inconsistent with the written stipulations and was obviously merely a statement by the appellant of an alleged construction of law.

(2) the statute will be read, together with the general usury statute which is in *pari materia*, so as to give reasonable effect to both statutes.

Territory v. Wills, 25 Haw. 747;

Gamewell Co. v. City and County of Honolulu,
33 Haw. 817;

(3) the entire statute will be taken as a whole to carry out the legislative purpose and intention, and so as to avoid injustice, oppression or an absurd consequence.

Hawaii v. Mankichi, 190 U. S. 197, 212, 213.

The enactment of Act 98, Laws Sp. S. 1941 (now c. 176, Revised Laws of Hawaii 1945), providing a code covering conditional sales in the Territory, is a further step in the direction of adopting salutary laws covering consumer credit in the Territory. Under this statute a conditional vendor of personal property cannot now charge more for his financing charges than a licensed industrial loan company could, if the transaction were financed by such a licensee under the provisions of the 1939 Act.

No reason has been shown why the construction of the 1937 Act by the Bank Examiner (R. 250-276) and the Supreme Court is invalid; that as a part of our system of laws governing money lending (which includes the laws governing small loans companies,⁵ building and loan companies,⁶ pawn brokers,⁷ Indus-

⁵Act 232, S. L. Haw. 1937; Chap. 171, R. L. Haw. 1945.

⁶Act 208, S. L. Haw. 1927, as amended; Chap. 153, R. L. Haw. 1945.

⁷Act 28, S. L. Haw. 1886, as amended; Secs. 7096-7101, R. L. Haw. 1945.

trial loan companies,⁸ the Conditional Sales Act,⁹ the general civil usury laws,¹⁰ the criminal usury law¹¹), such construction is reasonable and accords with the intent and purpose of the Legislature; that such construction cannot be disturbed without upsetting the entire statutory framework, and no cogent or other reason has been shown therefor.

The lower court's construction avoids any constitutional problem, and in the absence of manifest error, it must be accepted as correct.

Waialua Agricultural Co. v. Christian, 305 U. S. 91 (1938);

Walker v. O'Brien, 115 F. (2d) 956 (C.C.A. 9, 1940), cert. denied 312 U. S. 707, 85 L. ed. 1139.

II.

ASSUMING WITHOUT CONCEDED THAT THE STATUTORY CONSTRUCTION OF THE 1937 ACT BY THE SUPREME COURT WAS IN ERROR THE LEGISLATURE OF THE TERRITORY HAD AND EXERCISED CONSTITUTIONAL POWER TO REPEAL THE DEFENSE OF USURY RETROACTIVELY.

The trial court found it unnecessary to construe the 1937 Act because under the 1939 amendment it was made clear that the interest charges made were within permissible limits and if there was any defense

⁸Act 231, S. L. Haw. 1937, as amended; Chap. 170, R. L. Haw. 1945.

⁹Act 98, Law. Sp. S. 1941; Chap. 176, R. L. Haw. 1945.

¹⁰Sec. 8734, R. L. Haw. 1945.

¹¹Sec. 8736, R. L. Haw. 1945.

of usury at the time the notes sued on were executed, this defense had been repealed and the legislature had constitutional authority to do so. The majority of the Supreme Court adopted the view that the 1937 statute was clear and unambiguous and that the industrial loan company charged no more than they were permitted to do under the statute (R. 303-304). Judge E. C. Peters, in concurring, thought it was unnecessary to consider the language of the 1933 and the 1937 acts because the 1939 Act clarifying the earlier acts was clear and unambiguous and disposed of any defense that the appellant might have had (R. 309).

It is apparent that it will only be necessary for this court to consider the language or the constitutionality of the 1939 Act if this Court determines that the Supreme Court's construction of the 1937 Act is so "manifestly erroneous" as to require a correction. In order to permit the appellant to recover on his counterclaim, it would also be necessary for this court to overrule the decision of the Supreme Court in *Carey v. Discount Corp.*, 36 Haw. 107, stating the common law rule in Hawaii on the recoverability of interest paid. The appellant has not in his brief suggested any reasons why either the statutory construction or the general law in Hawaii on voluntary payments of interest should be revised by this court. In this section of the brief we shall merely summarize what seems to be undisputed law that if the appellant ever had any defenses under the 1937 Act, these defenses have been validly repealed by curative legislation.

- (a) The defense of usury is not available to the defendant with respect to the notes sued on by the plaintiff.

The Supreme Court found that the appellee charged no more than it was permitted to charge under the 1937 Act as administered by the Bank Examiner. The Supreme Court found no ambiguity in the 1937 Act, but certainly if there was any ambiguity in this Act, it was corrected in the 1939 Act.

Section 2 of Act 75, *Session Laws of Hawaii 1939*, reads as follows:

“Section 2. Insofar as, and to the extent that, it lies within the power of the legislature so to enact, it is hereby provided that the defense of usury provided by chapter 232, and particularly by section 7053, of the Revised Laws of Hawaii 1935, shall not be available to any party in any action brought upon or arising out of any note or other contract to pay or secure the payment of money heretofore made or executed to any person, firm, association or corporation as the payee or obligee of such note or contract, which payee or obligee was duly licensed under Act 154 of the Session Laws of Hawaii 1933, or under Act 231, Series D-140, of the Session Laws of Hawaii 1937, at the time of the making of such note or other contract, if such note or contract provides for, and there has been collected thereon by such payee or obligee or the holder thereof, no greater rate or amount of interest or other charges or both, than those that would have been permitted under this Act if it had been in force when such note or contract was made.”

Sec. 2, Act 75, *S. L. Haw. 1939*, 262.

It is wholly beyond dispute that plaintiff did not collect a "greater rate or amount of interest or other charges or both, than those that would have been permitted under this act (1939 Act) if it had been in force when such note or contract was made". This is made as clear in the 1939 Act as language can make anything clear. By Section 6782 (a) of the 1939 Act, providing definitions, it is specifically provided that the right permitted to have interest "deducted in advance" includes any of the following practices:

"(a) Such interest may be computed on the principal amount of the contract (at the maximum rate or rates mentioned in section 6782-L, or at any lesser rate or rates) for the duration of the contract as though such principal amount were to remain outstanding and unpaid for the full term of the contract, and such interest and other charges may be deducted from such principal amount at the time the loan is made and retained by the lender and applied (in the case of such other charges) for the purposes authorized by this chapter, notwithstanding the fact that periodical payments of principal are required by the contract and that the borrower does not receive the full amount of such principal, but only the balance thereof after such deductions.

"(b) The interest may be computed (at the maximum rate or rates mentioned in section 6782-L, or at any lesser rate or rates) upon the amount to be actually received by the borrower, as though said amount were to remain outstanding and unpaid for the full term of the contract, and such interest and other charges may be added to said amount to be actually received by the borrower,

and the total amount produced by such addition may then be constituted the principal amount of the contract, and the amount of the interest and other charges so added may then nevertheless be deducted from said principal amount and retained by the lender at the time the loan is made, notwithstanding the fact that periodical payments of said principal amount are required by the contract and that the amount actually received by the borrower is less, by the amount of the interest and other charges so added thereto, than said principal amount; provided, that no loan upon which interest and other charges have been added for the purpose of determining the principal amount of the contract shall be held usurious if the interest and other charges so added do not exceed the amount of interest and other charges which would be deductible from a loan of the same principal amount if computed in the manner set forth in paragraph (a) of this item (9)."

Act 75, *S. L. Haw. 1939*, 253-254.

The specific interest rates and other charges are set forth at length in *Section 6782-L* and the provisions thereof applicable to the notes in the case at bar are set forth in *subparagraphs 2(b), (c) and (d)* as follows:

"(b) Where interest is payable or deducted in advance upon a contract payable in a period of more than 18 months it shall not exceed an amount computed in the manner set forth in item (9) of section 6782-A, as follows: 12 per cent per annum for the first 18 months, plus 9 per cent per annum for the next 12 months (or portion thereof) plus

6 per cent per annum for the next 12 months (or portion thereof), plus 3 per cent per annum for the next 6 months (or portion thereof), of such period, as the case may be.

“Interest shall not be deductible in advance for more than four years.

“For example, upon a contract, the principal amount of which is \$120.00, payable in 24 months, in monthly installments of \$5.00, the maximum interest which may be deducted in advance under this section is computed as follows:

12% per annum of \$120.00 for first	
18 months	\$21.60
9% per annum of \$120.00 for next	
6 months	5.40

Total interest deductible in advance	
from the principal amount of the	
contract	\$27.00

“(c) In addition to collecting or deducting interest in advance, as aforesaid, the company may require and receive repayment of the principal amount of the contract in uniform weekly, monthly, or other periodical instalments with the privilege to the company (subject to the interest refund provisions of this section where applicable) to declare the entire unpaid balance due and payable in the event of default in the payment of any instalment.

“(d) In addition to requiring and collecting interest in the manner and at the rates hereinbefore provided for, the company may also require and receive the payment of interest at not to exceed 12 per cent per annum from the date of delinquency on any principal instalment or por-

tion thereof which remains unpaid on the date of maturity, of such instalment where there has been no extensions or deferment by mutual agreement, or where the amount extended or deferred is not paid, on the due date agreed upon."

Act 75, *S. L. Haw. 1939*, Sec. 6782-L, 2(b), (c) and (d).

It is only necessary to take the Plaintiff's Exhibits A-1 to H-1 (R. 22-42) and the Defendant's Exhibits 1-A to 38-A (R. 191-238) which were stipulated by the parties (R. 56) as showing the detailed facts with respect to each note mentioned in the plaintiff's complaint and in the defendant's counterclaim and to place the exhibits alongside the statute and it will be apparent that the charges made come well within the framework of the charges permitted under the 1939 Act.

(b) The defense of usury can be repealed retroactively.

It is now settled law in Hawaii that any and all rights with respect to usury are of statutory origin created by the legislature (*Carey v. Discount Corporation*, 36 Haw. 107, 113). The statutory history of usury in the Territory of Hawaii which had careful, detailed study in the foregoing case fully justifies the conclusion that the recovery of unlawful interest voluntarily paid did not form a part of the common law of this Territory (see 36 Haw. 117).

The general rule with respect to the retroactive repeal of usury statutes is clearly stated in 6 *R.C.L., Constitutional Law*, Sec. 348, p. 351, as follows:

“It is now generally recognized that the legislature may repeal a usury law, and that no one has any vested right to take advantage of such laws, nor does their repeal operate as an impairment of the obligation of contracts. Independent of the nature of the forfeiture as a penalty, which is taken away by a repeal of such a statute, the more general and deeper principle on which they are to be supported is, that the right of a defendant to avoid his contract is given to him by statute, for the purpose of its own, and not because it affects the merits of his obligations; and that, whatever the statute gives, under such circumstances, as long as it remains in fieri, and not realized, by having passed into a completed transaction, may by a subsequent statute be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere in the contract.”

In 66 *C.J.*, *Usury*, p. 169 the general rule is laid down as follows:

“Sec. 55. b. *Contracts Previously Usurious.*

(1) *In General.* The defense of usury is a statutory defense not founded on any common-law right, either legal or equitable. It is generally considered not to be in the nature of a vested constitutional right secure against legislative invasion, but that it constitutes a privilege, and that it is within the power of the legislature to take it away. Thus the right of a debtor under a usurious contract *to refuse to pay any interest, or to offset against the original debt interest already paid, or to recover usury, has been held not to be a vested right.* * * *” (Italics ours.)

This court has conclusively determined the nature of rights arising out of usury statutes and has settled any question as to the constitutionality of retroactive repeal of such statutes.

In *Petterson v. Berry*, 125 Fed. 902 (C.C.A. 9th, 1903), the court had for consideration a case brought in the District Court of the United States for the District of Alaska on a promissory note bearing interest at twelve per cent. Defendants pleaded usury under an Oregon statute made applicable by the Organic Act to the Territory of Alaska under which contracts providing for interest in excess of eight per cent were deemed usurious with a forfeiture of the entire debt. By later act applicable to Alaska, the rate of interest was changed to twelve per cent and the question arose as to whether the latter statute should be construed retroactively and, if so construed, whether the statute was constitutional. This court said at page 905:

“It is well settled that the defense of usury, either to the principal of a contract debt or to the interest thereon, is in the nature of a penalty or forfeiture, which may be taken away by legislation, both as respects previous as well as subsequent contracts. This is sufficiently shown by the case of *Ewell v. Daggs*, 108 U.S. 143, 2 Sup. Ct. 408, 27 L. Ed. 682, but we add other references.”

The court cited a multitude of cases, all of which are in accord with the principle announced. In *Ewell v. Daggs*, 108 U. S. 143, 27 L. Ed. 682, the constitutionality of a retroactive repealing statute was in

issue. In a suit brought to foreclose a mortgage the borrower set up by way of defense that he had received in cash only \$2,000.00 and had executed a promissory note for \$3,556.00, payable in three years and that the note was given for interest at the rate of twenty per cent per annum, compounded annually, on which defendant had paid \$1,745.00. A Texas statute in force at the time the transaction was entered into made a contract for interest in excess of twelve per cent per annum void as to the entire interest with the right to recover principal only. Prior to the bringing of suit the usury statute had been repealed and the question arose whether the retroactive repeal could be constitutionally applied to the notes which were usurious when executed. The court considers the nature of the defense of usury and points out the distinction between acts which are *mala in se* and those which are *mala prohibita*, pointing out that a usury statute falls under the second classification: where the only bar to recovery is a statutory bar the legislative branch which imposed the statutory limitation may remove the same retroactively. The court uses the following significant language at pages 684, 685:

“The effect of the usury statute of Texas was to enable the party sued to resist a recovery against him of the interest which he had contracted to pay, and it was, in its nature, a penal statute inflicting upon the lender a loss and forfeiture to that extent. Such has been the general, if not uniform, construction placed upon such statutes. And it has been quite as generally de-

cided that the repeal of such laws, without a saving clause, operated retrospectively, so as to cut off the defense for the future, even in actions upon contracts previously made. *And such laws, operating with that effect, have been upheld as against all objections, on the ground that they deprived parties of vested rights, or impaired the obligation of contracts.* (Citing cases.)

“And these decisions rest upon solid ground. Independent of the nature of the forfeiture as a penalty, which is taken away by a repeal of the Act, the more general and deeper principle on which they are to be supported is, that the right of a defendant *to avoid his contract is given to him by statute, for purposes of its own*, and not because it affects the merits of his obligation; and that, whatever the statute gives, under such circumstances, as long as it remains *in fieri*, and not realized, by having passed into a completed transaction, may by a subsequent statute be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere in the contract. The benefit which he has received as the consideration of the contract, which contrary to law he actually made is just ground for imposing upon him by subsequent legislation, the liability which he intended to incur. That principle has been repeatedly announced and acted upon by this court. (Citing cases.)

“The right which the curative or repealing Act takes away in such a case is the right in the party to avoid his contract, a naked legal right which is usually unjust to insist upon, and which no constitutional provision was ever designed to pro-

tect.” *Ewell v. Daggs* (italics ours), 108 U. S. 143, 27 L. Ed. 682.

The rule of this circuit has been uniformly followed in the state courts.

Curtis v. Leavitt, 15 N. Y. 9, 154;

Mechanics Bank and Bldg. Assn. v. Allen, 28 Conn. 97 (1859);

Welch v. Wadsworth, 30 Conn. 149, 79 Am. Dec. 236;

Iowa Savings & Loan Assn. v. Heidt, 107 Iowa 297, 77 N. W. 1050 (1899);

Jefferson Standard Life Ins. Co. v. Dattel, 83 F. (2d) 504 (C.C.A. 5th, 1936);

Hinman v. Goodyear, 56 Conn. 210, 14 Atl. 804 (1888);

Fenton v. Markwell, 52 P. (2d) 297 (1935).

For collection of cases see 87 A. L. R. 462 at 470 under Title “IV. Modification or repeal of usury statute as affecting existing usurious contract.”

- (c) **The appellant cannot rely upon a claim of usury to maintain a setoff or counterclaim for payments of interest already made.**

Carey v. Discount Corporation (supra), states the settled law in Hawaii as to the legal effect of an overpayment of interest:

1. There is no common law right to recover usurious interest in Hawaii.

“By Act 137 of the Session Laws of Hawaii 1931, section 1483, supra, as amended, was repealed and section 7053 was enacted as a sub-

stitute therefor. This Act, for the first time, declared that if a greater rate of interest than the maximum authorized by the statute shall be contracted for, the contract shall not, by reason thereof be void. After the foregoing declaration as to the validity of a contract for a greater rate of interest than is authorized by the statute, the rights and liabilities of the parties to the contract in an action on the contract are set forth in the statute and provide ample protection to the borrower when sued upon the contract. In fact, the statute gives the borrower more relief when sued on the contract than plaintiff seeks in this case. *The statute makes no specific reference to the rights and liabilities of the parties, where, as here, the contract has been performed and the borrower sues to recover the usurious interest paid. That our lawmakers never subscribed to the ancient common law theory of inherent vice in the taking of interest for the loan of money, is too clear to admit of argument.*" *Carey v. Discount Corporation*, 36 Haw. 113, 114. (Italics ours.)

2. The statutes of usury contain all the law applicable to usury in Hawaii.

"It seems clear to us, and no one has contended otherwise, that section 7053, which we have set forth above, defines fully the rights and liabilities of the parties to usurious contracts in suits upon the contract, and if different rights and liabilities existed at common law, they have been superseded by our statute on the subject. In other words, in a suit upon a contract for the payment of interest claimed by the defendant to be usurious, section 7053 contains all the law applicable to the controversy. Does it likewise supersede the common

law applicable to a suit to recover usurious interest after full performance of the contract?" *Carey v. Discount Corporation*, 36 Haw. at 114, 115.

3. The statutes have rejected the common law on which recovery is allowed elsewhere.

"The question then is, has our statute (Sec. 7053) rejected the principle underlying the common law rule permitting a borrower to recover the excess interest paid? If recovery at common law was based upon the fact that a contract to pay usury is void, then the declaration of our statute that 'If a greater rate of interest than one per centum per month shall be contracted for, the contract shall not, by reason thereof, be void,' *certainly rejects the common law by principle upon which recovery was based.*" *Carey v. Discount Corporation*, 36 Haw. 117. (Italics ours.)

At the time that the Industrial Loan Act was adopted in 1937 by Act 231, S. L. Haw. 1937, there was also adopted Act 232, S. L. Law. 1937, relating to small loan companies, and also Act 222, S. L. Haw. 1937, amending the Criminal Usury Statute. The 1937 amendment to the Criminal Usury Statute added the words "except as otherwise permitted by law" to the section making the receipt of interest in excess of one per cent per month a criminal offense. Since the three statutes, adopted virtually simultaneously, relate to the same subject matter it is proper to consider them in *pari materia*. So considered, it is apparent that the legislature did not intend to set up a statutory scheme of charges for special types of money lenders furnish-

ing consumer credit and, at the same time, declare that the exaction of interest so licensed constitutes criminal usury. But this is exactly the position contended for by the defendant.

But assuming *arguendo* that there is any basis for a consideration of the Criminal Usury Statute, it is clear that in 1939, the Legislature, exercising its constitutional power, made the Criminal Usury Statute wholly inapplicable to industrial loan companies, first, by providing specifically in Section 6782-W of the 1939 Act (p. 262), that the provisions of the general usury statute (Sec. 7053 R. L. Haw. 1935 (now Sec. 8734 R. L. Haw. 1945)), and the Criminal Usury Statute (Sec. 7055 R. L. Haw. 1935 (now Sec. 8736 R. L. Haw. 1945)) shall be inapplicable to industrial loan companies; and second, by providing that no action to recover interest paid to industrial loan companies could be recovered.

Section 4 of Act 75, S. L. Haw. 1939 imposes a clearly constitutional statutory block, said statute reading as follows:

“Section 4. Insofar as, and to the extent that, it lies within the power of the legislature so to enact, it is hereby provided that no action to recover any interest or charges alleged to have been paid or any amount alleged to have been paid, as such interest or charges, by any obligor under any note or other contract made on or after the effective date of Act 154 of the Session Laws of Hawaii, 1933, and before the effective date of this Act, in excess of the interest and charges which were legally chargeable or collectible under the

law then in effect and applicable to the lender, shall lie or be instituted or prosecuted against any person, firm, association or corporation which was duly licensed under either said Act 154, or Act 231, Series D-140, of the Session Laws of Hawaii 1937, at the time such note or contract was made." (Sec. 4, Act 75, S. L. Haw. 1939, 263.)

In view of the decision in the *Carey v. Discount Corporation* case it can no longer be argued that there is any common law right of recovery of interest paid. Any rights of recovery or setoff in Hawaii must depend upon the statutory privilege granted either by the Civil Usury Statute or the Criminal Usury Statute, or by both. It is clear that the Legislature of the Territory of Hawaii has withdrawn any privilege that ever existed to recover such interest so far as statutory licensees mentioned in the Act are concerned. It remains, therefore, only to determine whether this withdrawal was constitutional.

It is clear that no person has a vested right to recover alleged usurious interest already paid and that where a statute validates prior contracts the legislature may retroactively repeal any claims for interest already paid.

Penzinger v. West American Finance Co., 74 P. (2d) 252 (Calif. 1937);

Wolf v. Pacific Southwest Discount Corporation, 74 P. (2d) 263;

Iowa Savings and Loan Association v. Heidt, 107 Iowa 297, 77 N. W. 1050;

Alston v. American Mortgage Co., 157 N. E.
 374 Ohio (1927), 156 N. E. 606;
Holmes v. French, 68 Me. 525;
Jefferson Standard Life Ins. Co. v. Dattel,
 83 F. (2d) 504 (C.C.A. 5th 1936);
Hinman v. Goodyear, 56 Conn. 210, 14 Atl. 804
 (1888);
Fenton v. Markwell, 52 P. (2d) 297 (1935);
Ewell v. Daggs, 108 U. S. 143, 27 L. Ed. 682;
Petterson v. Berry, 125 F. 902 (C.C.A. 9th)
 (1903);
Curtis v. Leavitt, 15 N. Y. 9;
Mechanics Bank and Bldg. Assn. v. Allen, 28
 Conn. 92;
Welch v. Wadsworth, 30 Conn. 149, 79 Am.
 Dec. 236.

In *Penzinger v. West American Finance Co.*, *supra*,
 the court had for consideration the retroactive repeal
 of the general usury statute by a constitutional pro-
 vision. Suit had been brought against a finance com-
 pany to recover treble damages for excess interest
 paid. The court uses the following language, page 257:

"There can be no doubt that if the consti-
 tutional provision did in fact repeal the Usury
 Law of 1918 without a saving clause, plaintiff's
 cause of action fell with such repeal. The right
 to recover treble damages given by section 3 of
 the Usury Law is a purely statutory remedy, not
 existing at common law, and is likewise a penalty
 imposed upon the lender. *The rule in such cases*
is clear that where no rights are vested the right
falls and the statutory remedy ceases to exist

upon the repeal of the statute without a saving clause unless the right has been converted into a final judgment prior to a repeal of the statute. Although the cause of action upon which the judgment herein is based, accrued prior to the date of the alleged repeal, the judgment was entered subsequent to that date. The repeal of the statute without a saving clause would therefore wipe out the cause of action and render the judgment of no legal validity.” (Citing cases.) (Italics ours.)

In *Wolf v. Pacific Southwest Discount Corporation*, supra, the court considers the same modification of the California Usury Law and holds that where the specific type of finance company is exempted from the provisions of the general usury law, this disposes of all causes of action through and prior to the adoption of the amendment, page 264.

“It will be further noted that the constitutional amendment repealing the provisions of the usury law as to those excepted classes contains no saving clause as to causes of action accruing prior to the adoption of said amendment. A repeal of the statute, or the amendment thereof, resulting in a repeal of the statutory provisions under which the cause of action arose wipes out the cause of action unless the same has been merged into a final judgment.” (p. 264.)

In *Ewell v. Daggs*, supra, the United States Supreme Court was considering the repealed Texas usury statute which in *haec verba* declared a usurious contract to be void and of no effect. In holding that the retroactive statute was constitutional, the court used this language (p. 684):

“It is quite true that the usury statute referred to, declares the contract of loan, so far as the whole interest is concerned, to be void and of no effect. But these words are often used in statutes and legal documents, such as deeds, leases, bonds, mortgages and others, in the sense of voidable merely, that is, capable of being voided, and not as meaning that the act or transaction is absolutely a nullity, as if it never had existed, incapable of giving rise to any rights or obligations under any circumstances. Thus we speak of conveyances void as to creditors, meaning that creditors may avoid them, but not others. Leases which contain a forfeiture of the lessee’s estate for nonpayment of rent, or breach of other conditions, declare that on the happening of the contingency the demise shall thereupon become null and void, meaning that the forfeiture may be enforced by re-entry; at the option of the lessor. It is sometimes said that a deed obtained by fraud is void, meaning that the party defrauded may, at his election, treat it as void.

“All that can be meant by the term, according to any legal usage, is that a court of law will not lend its aid to enforce the performance of a contract which appears to have been entered into by both the contracting parties for the express purpose of carrying into effect that which is prohibited by the law of the Land. Broom, Leg. Max., 732.”

It is sufficient to point out that the only statute dealing with civil rights arising out of usury in the Territory of Hawaii was Section 7053 R. L. Haw. 1935 (now Sec. 8734 R. L. Haw. 1945) which, as pointed out in *Carey v. Discount Corporation*, is a

specific legislative declaration that the contract shall not by reason of usurious interest be void.

Thus, it is seen that by clear determination of the United States Supreme Court (followed by this court in *Petterson v. Berry*, supra, page 32), even a statutory provision that a usurious contract is void may be retroactively repealed and void contracts validated without disturbing constitutional rights. In the case at bar, it is not necessary for the court to go to the full extent of the decisions above referred to for it is clear that even in the absence of the 1939 Act, under the common law rule enunciated in *Carey v. Discount Corporation*, the appellant could not have recovered on his counterclaim. No argument has been suggested or advanced in the defendant's brief as to why the Legislature could not constitutionally clarify the statutes behind which the defendant seeks to hide to avoid undertakings entered into in good faith with the plaintiff.

It is submitted that it is not necessary to consider the 1939 Act because the construction of the Supreme Court sustained the administrative construction of the 1937 Act. It is not only "manifestly erroneous" but is the only reasonable construction that would make the legislative act ineffectual and meaningless.

CONCLUSION.

The appellant has admitted and the lower courts have found as a fact that all the loans which are the subject of the complaint were made by the plaintiff

and have been unpaid; there is no dispute that all such loans were made after the 1937 Act went into effect and that the charges made were substantially less than the charges permitted under the rulings of the Bank Examiner, sustained as valid by the Supreme Court. It has been demonstrated that the Bank Examiner's interpretation of the statute and the construction of the Supreme Court are reasonable and are in accordance with settled canons of statutory construction. Therefore, aside from any consideration of the 1939 clarification, the judgment of the Supreme Court would have to be affirmed.

Assuming only for purposes of argument that the charges exacted by the appellee exceeded at the time the statutory limits, it is undisputable that the Bank Examiner's and the Supreme Court's construction of the statute was validated retroactively by the 1939 amendment. The Legislature had constitutional power to validate the transactions retroactively.

Accordingly, it is respectfully submitted that the judgment of the Supreme Court should be affirmed.

Dated, Honolulu, T. H. this 9th day of June, 1948.

Respectfully submitted,

J. RUSSELL CADES,

Attorney for Appellee.

SMITH, WILD, BEEBE & CADES,

CARLSMITH & CARLSMITH,

Of Counsel.

(Appendices I, II, III and IV Follow.)

Appendices.



Appendix I

Act 154 of the Session Laws of Hawaii 1933.

An Act to license and regulate the business of making loans and to provide exemption and punishment for the violation of this Act.

* * * * *

Section 4. Powers. Every person, co-partnership or corporation under the provisions of this Act shall have power:

(a) To loan money on personal security, or otherwise, and to deduct interest therefor in advance at the rate of one per cent per month, or less and, in addition, may receive and require uniform weekly or monthly installments.

Appendix II

Act 231 of the Session Laws of Hawaii 1937.

An Act to amend Title XXIV of the Revised Laws of Hawaii 1935, by Adding thereto a new chapter to be numbered and known as Chapter 223-A and Forty-two New Sections to be Numbered 6782, 6782-A, 6782-B, 6782-C, 6782-D, 6782-E, 6782-F, 6782-G, 6782-H, 6782-I, 6782-J, 6782-K, 6782-L, 6782-M, 6782-N, 6782-O, 6782-P, 6782-Q, 6782-R, 6782-S, 6782-T, 6782-U, 6782-V, 6782-W, 6782-X, 6782-Y, 6782-Z, 6782-AA, 6782-BB, 6782-CC, 6782-DD, 6782-EE, 6782-FF, 6782-GG, 6782-HH, 6782-II, 6782-JJ, 6782-KK, 6782-LL, 6782-MM, 6782-NN and 6782-OO; to Provide for the establishment, operation, maintenance, government, powers, duties, license fees, control and regulation of industrial loan and investment companies as therein defined: to Provide for the administration of the Act: to Confer certain powers and impose certain duties in respect to such companies upon the Treasurer and Deputy Bank Examiner of the Territory of Hawaii: to Impose certain penalties for violations thereof and repealing Chapter 233 of the Revised Laws of Hawaii 1935.

* * * * * *

Sec. 6782-N. Rate or rates of interest. No industrial loan and investment company, subject to the provisions of this chapter, shall directly or indirectly charge, contract for, collect or receive any interest, discount, fees, charges or other consideration on any loan or loans made by it except as provided by this section.

Interest on loans made by any industrial loan and investment company, subject to this chapter, may be deducted in advance at the rate of but not exceeding one per centum (1%) per month, and in addition, the company may require and receive weekly, monthly or other periodical installments with the privilege to the company to declare the entire unpaid balance due and payable in the event of default in the payment of any installment. No person, firm, association, partnership or corporation (not holding a license issued under this chapter) shall charge, contract for, collect or receive interest, discounts, fees, charges or other consideration on any loan or loans in the amount or in the manner provided in this section, unless permitted so to do by other territorial law.

Appendix III

Act 75 of the Session Laws of Hawaii 1939.

An Act Relating to the business of industrial loans, amending Chapter 223A of the Revised Laws of Hawaii 1935, as enacted by Act 231 of the Session Laws of Hawaii 1937, providing for the purging of usury of certain loans heretofore made by licensees under previous laws, if adjusted to conform to this act, and restricting the defense of usury and actions based on the usurious nature of certain loans heretofore made by such licensees.

* * * * *

Section 1. Chapter 223A of the Revised Laws of Hawaii 1935, as enacted by Act 231 of the Session Laws of Hawaii 1937, relating to the business of industrial loans is hereby amended to read as follows:

“Sec. 6782. Application. This chapter shall be applicable to every person, firm, partnership, company, corporation and unincorporated association engaged in or attempting to engage in business as an industrial loan company or which shall hereafter be organized for the purpose of engaging or attempting to engage in the industrial loan business, as defined in this chapter, and which charges, contracts for or receives on any loan a greater rate of interest, discount or consideration than would be permissible under the provisions of section 7052.

“Sec. 6782A. Definitions. As used in this chapter and unless a different meaning appears from the con-

text: * * * (9) where interest or other charges, or both, are authorized or permitted by this chapter to be 'paid in advance', 'deducted in advance', 'collected in advance', 'received in advance', or 'charged in advance', or where any or all of them are expressed to be 'payable', 'deductible', 'collectible', or 'chargeable', 'in advance', or where any expressions of similar import are used, they shall be construed as authorizing and permitting, (in addition to any other practices permitted by this chapter) any of the following practices:

(a) Such interest may be computed on the principal amount of the contract (at the maximum rate or rates mentioned in section 6782-L, or at any lesser rate or rates) for the duration of the contract as though such principal amount were to remain outstanding and unpaid for the full term of the contract, and such interest and other charges may be deducted from such principal amount at the time the loan is made and retained by the lender and applied (in the case of such other charges) for the purposes authorized by this chapter, notwithstanding the fact that periodical payments of principal are required by the contract and that the borrower does not receive the full amount of such principal, but only the balance thereof after such deductions.

* * * * *

"Sec. 6782-L. Interest rates; other charges; refunds.

1. No industrial loan company shall directly or indirectly charge, contract for, collect or receive any

interest, discount, fees, charges or other consideration on any loan made by it except as provided by this section.

2. An industrial loan company may charge, contract for, receive or collect in advance interest or discount at any rate which does not exceed the following maximum rate for the particular period and type of contract hereinafter set forth, computed in the manner set forth in item (9) of section 6782-A, at the inception of the contract, to-wit:

(a) Where interest is paid or deducted in advance for a period of not more than 18 months upon any contract (whether the principal amount of such contract is payable in one payment at the end of the maturity period thereof or in instalments), it shall not exceed 12 per cent per annum computed in the manner set forth in item (9) of section 6782-A at the inception of the contract.

(b) Where interest is payable or deducted in advance upon a contract payable in a period of more than 18 months, it shall not exceed an amount computed in the manner set forth in item (9) of section 6782-A, as follows: 12 per cent per annum for the first 18 months, plus 9 per cent per annum for the next 12 months (or portion thereof), plus 6 per cent per annum for the next 12 months (or portion thereof), plus 3 per cent per annum for the next 6 months (or portion thereof), of such period, as the case may be.

Interest shall not be deductible in advance for more than four years.

For example, upon a contract, the principal amount of which is \$120.00, payable in 24 months, in monthly instalments of \$5.00, the maximum amount of interest which may be deducted in advance under this section is computed as follows:

12% per annum of \$120.00 for first 18 months,	\$21.60
9% per annum of \$120.00 for next 6 months,	5.40
Total interest deductible in advance from the principal amount of the contract,	\$27.00

(c) In addition to collecting or deducting interest in advance, as aforesaid, the company may require and receive repayment of the principal amount of the contract in uniform weekly, monthly or other periodical instalments with the privilege to the company (subject to the interest refund provisions of this section where applicable) to declare the entire unpaid balance due and payable in the event of default in the payment of any instalment.

(d) In addition to requiring and collecting interest in the manner and at the rates hereinbefore provided for, the company may also require and receive the payment of interest at not to exceed 12 per cent per annum from the date of delinquency on any principal instalment or portion thereof which remains unpaid on the date of maturity, of such instalment where there has been no extensions or deferment by mutual agreement, or where the amount extended or deferred is not paid on the due date agreed upon.

* * * * *

“Sec. 6782-X. Short Title. This Act shall be known and may be cited as ‘The Industrial Loan Act’.”

Section 2. Insofar as, and to the extent that, it lies within the power of the legislature so to enact, it is hereby provided that the defense of usury provided by chapter 232, and particularly by section 7053, of the Revised Laws of Hawaii 1935, shall not be available to any party in any action brought upon or arising out of any note or other contract to pay or secure the payment of money heretofore made or executed to any person, firm, association or corporation as the payee or obligee of such note or contract, which payee or obligee was duly licensed under Act 154 of the Session Laws of Hawaii 1933, or under Act 231, Series D-140, of the Session Laws of Hawaii 1937, at the time of the making of such note or other contract, if such note or contract provides for, and there has been collected thereon by such payee or obligee or the holder thereof, no greater rate or amount of interest or other charges or both, than those that would have been permitted under this Act if it had been in force when such note or contract was made.

Section 3. Insofar as, and to the extent that it lies within the power of the legislature so to enact, it is hereby provided that the defense of usury provided by chapter 232, and particularly by section 7053, of the Revised Laws of Hawaii 1935, shall not be available to any party in any action brought upon or arising out of any note or other contract to pay or secure the payment of money heretofore made or executed to

any person, firm, association or corporation as the payee or obligee of such note or contract, which payee or obligee was duly licensed under Act 154 of the Session Laws of Hawaii 1933, or under Act 231, Series D-140, of the Session Laws of Hawaii 1937, at the time of making such note or other contract, upon or in which note or contract a greater amount or rate of interest or other charges or both has been contracted for or collected by the payee or holder thereof than was permitted under the statutes in force when said note or contract was made, provided the holder thereof, within thirty days after the effective date of this Act, shall refund or credit, to the obligors on said note or contract, the excess, if any, of such interest or charges or both which has been collected over and above the interest and charges which could legally have been charged or collected under this Act if this Act had been in effect at the time such loan or contract was made, and shall not thereafter charge or collect from such obligors on account of said note or contract any interest or charges in excess of those chargeable or collectible upon a loan made under this Act.

Section 4. Insofar as, and to the extent that, it lies within the power of the legislature so to enact, it is hereby provided that no action to recover any interest or charges alleged to have been paid, or any amount alleged to have been paid as such interest or charges, by any obligor under any note or other contract made on or after the effective date of Act 154 of the Session Laws of Hawaii 1933, and before the

effective date of this Act, in excess of the interest and charges which were legally chargeable or collectible under the law then in effect and applicable to the lender, shall lie or be instituted or prosecuted against any person, firm, association or corporation which was duly licensed under either said Act 154, or Act 231, Series D-140, of the Session Laws of Hawaii 1937, at the time such note or contract was made.

This section shall also apply to causes of action pending on the effective date of this Act, upon which no final judgment has been entered on said date."

* * * * *

(The foregoing sections constitute a portion of
Chapter 170, Revised Laws of Hawaii 1945.)

Appendix IV

Section 8734, Revised Laws of Hawaii 1945.

Sec. 8734. Usury not recoverable. If a greater rate of interest than one per centum per month shall be contracted for, the contract shall not, by reason thereof, be void. But if in any action on such contract proof be made that a greater rate of interest than one per centum per month has been directly or indirectly contracted for, the plaintiff shall only recover the principal and the defendant shall recover costs. If interest shall have been paid, judgment shall be for the principal less the amount of interest paid; provided, however, that this section shall not be held to apply to contracts for money lent upon bottomry bonds or upon other maritime risks nor to loans made under the provisions of chapter 170. (C. C. 1859, s. 1483; am. L. 1898, c.4, s.4; R.L. 1925, s. 3588; am. L. 1931, c. 137, s. 1; R.L. 1935, s. 7053; am. L. 1939, c. 75, pt. of s. 1 (6782 W).)



No. 11,703

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GEORGE B. CAREY,

Appellant,

vs.

HILO FINANCE & THRIFT CO., LTD.,
a Corporation,

Appellee.

Upon Appeal from the Supreme Court of the
Territory of Hawaii.

APPELLANT'S REPLY BRIEF.

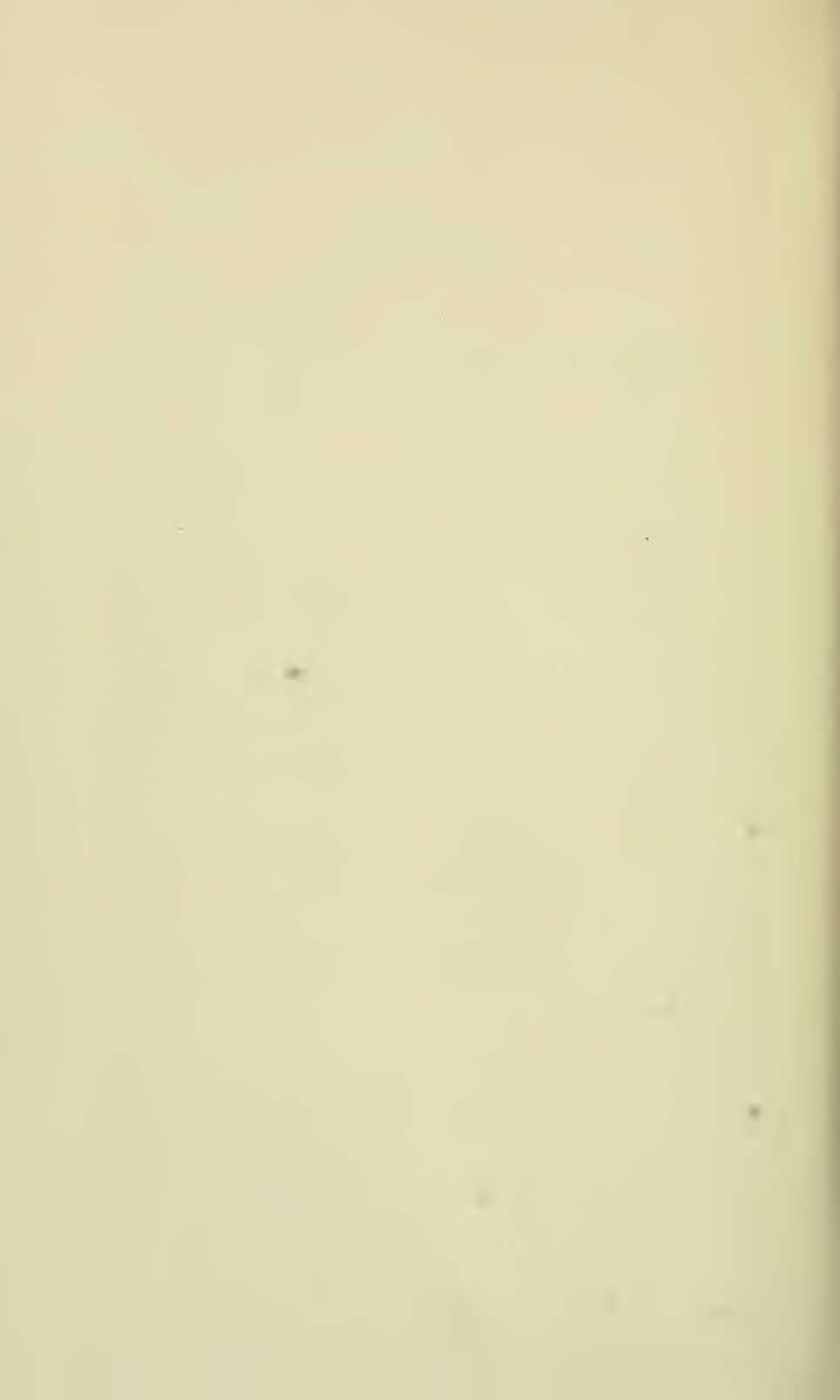
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Attorney for Appellant.

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APPELLANT'S REPLY BRIEF.

CONSIDERATION OF SEVEN OF THE NOTES SUED ON, THE PROCEEDS OF WHICH WERE APPLIED TO DEFENDANT'S ANTECEDENT NOTE INDEBTEDNESS FAILED IN PART OR TOTALLY BECAUSE DEFENDANT'S ANTECEDENT NOTE INDEBTEDNESS WAS TAINTED WITH AND CONSISTED WHOLLY OR IN PART OF UNRECOVERABLE USURY AND COMPOUND INTEREST, DEFENDANT HAVING PAID SUCH PART OF HIS ANTECEDENT INDEBTEDNESS AS CONSTITUTED A VALID OBLIGATION.

It was not contemplated that installments of defendant's 46 notes would be paid in cash when due—they never were—but that new notes of defendant would replace them. Defendant made a new note each

month for four years, part, if not all, of the consideration of which was the discharge of installments due on older notes with four exceptions (R. 31, 221, 230, 236). When the first installment of \$155.32 of a note for \$2330 became due, plaintiff credited defendant with payment thereof and took defendant's second note covering the \$155.32, credited on the first note, plus \$1844.68 advanced to defendant (Appellant's Brief, page 8) and interest of \$330 on the total of \$2000. Thus plaintiff charged interest monthly on the amount necessary to cover installments due on prior notes which were themselves packed with interest. Such was the bargain. Herein is the clue to plaintiff's excess charges. The point was not adverted to by the Supreme Court. It was not brought to the Court's attention.

Plaintiff's witness, Hugh Tennent, testified that he made all arrangements between the parties (R. 59), and that the first agreement was for defendant to borrow \$12,000 or \$15,000 in 12 monthly borrowings (R. 72). Pursuant to this agreement, defendant actually borrowed \$13,885.04 in 13 borrowings, that is to say, defendant received a total of this sum in diminishing cash advances over a period of 13 months (Appellant's Brief, pages 6-8). It was, therefore, a part of the first agreement between the parties that the defendant should receive diminishing sums monthly on notes for \$2330 and that the difference between these sums and \$2000, the purported actual loan was to be applied to installments on prior notes due at the time the cash advances were made.

Plaintiff's witness, Hugh Tennant, further elaborated on the practice of applying portions of the proceeds of monthly notes to installments due on prior notes (R. 77, 78, 81, 83). This witness further testified that, except when the defendant received the entire proceeds of notes in cash (this happened only four times (R. 31, 221, 230, 236) in the four years involved) the proceeds were applied in part to installments due on former notes (R. 78). As pointed out below, \$67,764.60 or 436 installments of \$155.32 each were taken care of by notes.

Appellant's Exhibits 1-A to 38-A (R. 191-238) and Appellee's Exhibits A-1 to H-1 (R. 22-43), show that installments on all notes were paid consistently each month as new notes were given, and that the proceeds of practically all the notes were credited in part to pre-existing notes.

The figures in this case are nothing short of fantastic in comparison with amount of actual money involved. It appears from Appendix I, Appellant's Brief, which may be verified by comparison with the record that the defendant executed notes payable to the plaintiff in the total sum of \$104,850 (\$117,665, total of third column less total of first five notes, aggregating \$5825 which antedated notes involved and less three notes aggregating \$6990 coming after last note sued on), of which \$67,764.60 was paid by credit derived from notes (\$78,813, total of seventh column less total of first five notes, \$5825 minus credits thereon of \$776.60 or \$5048.40 and less the \$6000 of credits from notes coming after the last sued on dated Febru-

ary 28, 1938). It is clear, therefore, that the understanding of the parties was that monthly installments on defendant's notes were to be paid, as they were in fact paid by interest bearing notes for the interest bearing installments.

Defendant had no alternative but to execute new notes with which to pay old ones. He could not pay in cash (R. 139). Plaintiff, being amply secured (R. 118, 119) was indulgent by accepting defendant's notes for compound interest. The continuity of the transaction and the compounding of interest at 30-day intervals are earmarks of the vice involved. The practice was oppressive against public policy and reprehensible. Plaintiff may not recover on the notes to the extent of the compound interest covered by them.

In *Commonwealth v. Loan Corporation*, 116 Pa. Super. Ct. 365, 176 Atl. 516, a money lender loaned \$150 to a borrower on a note payable one day after date with interest at $3\frac{1}{2}$ per cent per month in 20 equal installments of \$7.50 each. On December 17, 1928, money lender made a further loan for \$30 with interest at $3\frac{1}{2}$ per cent per month, taking borrower's note. On April 10, the money lender took another note from the borrower in the sum of \$200 with interest at $3\frac{1}{2}$ per cent per month. The principal of the note represented \$134.36 due on the \$150 note and interest thereon of \$35.27 and \$22.60 balance of principal on the \$30 note and interest thereon of \$2.07, cash balance to borrower of \$.18. When the \$200 note was given on April 10, 1930, the \$150 loan and the \$30 were marked paid. The Court said:

This (allowance of compound interest) is not so, where as here a large rate of interest is originally charged as provided for in the statute and there is a specific provision that no additional charges, etc., shall be made. That is an expressed warning to money lenders that interest cannot be compounded. It would be against public policy thus to impose additional interest upon those who must by force of necessity pay higher rates to provide for their immediate needs.

The defendant, money lender, was convicted under penal provisions of the loan statutes involved.

The loan statutes involved in the instant case, namely, Section 7604, Revised Laws of Hawaii, 1935, and Section 6782-N, Session Laws of Hawaii, 1937, contain no express prohibition against the compounding of interest. Section 6782-N provides, however, that no licensee money lender shall directly or indirectly charge, contract for or collect or receive any interest, discount, fees, charges, or other consideration on any loan or loans made by it, except as provided by the section. This provision taken together with the statutory interdiction of compound interest *eo nomine* contained in Section 8737, Revised Laws of Hawaii, 1945, which was in force during the period covered by the notes clearly deprives the plaintiff of any claim for compound interest.

See also *Frazier v. Investment Company*, 42 Ga. Ap. 585, 157 S. E. 102; *Lanier v. Consolidated Loan Company*, 47 Ga. Ap. 148, 170 S. E. 99.

The interest charged by plaintiff in the sum of \$330 for a \$2000 loan was for the use of \$2000 for 15 months. Plaintiff was entitled, however, to require monthly installments of the total of the principal and interest, thus exacting interest on increasing portions of the principal of which defendant did not have the use after the first month. But it is certain that plaintiff was not entitled to more interest than one per cent per month for 15 months on the total loan. The sum of \$155.32, representing the first monthly installment, was part of the \$2330 for the use of which for 15 months plaintiff had charged interest in the sum of \$330. Plaintiff, therefore, would not be entitled to charge additional interest for the use of this same \$155.32 for the balance of the same 15 months' period. Otherwise, the right to require payment of principal and interest in installments would authorize collection of unearned interest on increasing parts of the principal which the installments paid and double interest on the installments, i.e., prepaid interest on the principal for 15 months and interest on installments of the principal for the same period. Nor may plaintiff indirectly charge interest on installments by charging interest on fictitious advances or credits with which to pay the installments.

If plaintiff's authority to require monthly installments justified the agreement between the parties, whereby defendant gave and plaintiff accepted monthly interest bearing notes instead of cash in payment of the installments, plaintiff's authority to declare the whole indebtedness due upon defendant's

default in any installment would justify an agreement between the parties, whereby defendant would default in paying the first installment and plaintiff would thereupon declare principal and 15 months of interest thereon due, collecting \$330 for the use of \$2000 for 30 days.

Section 6782N, Session Laws of Hawaii, 1939, confers only one right on the lender in case of the borrower's default in an installment, namely, to declare the whole debt due. The right to exact interest within the term of the loan on an installment which carries its own interest for the term or on credit or cash with which to meet the installment is not provided and is excluded by the *expressio unius est exclusio alterius* rule of construction as well as by statute's limitation on interest. If plaintiff may not by antecedent agreement with defendant charge him interest on the interest bearing installments during the term for which the interest on the installments was computed, plaintiff may not charge interest on a sum equal to the installment and take defendant's note in the sum plus interest in lieu of the installment.

Suppose plaintiff had proposed to defendant as follows: "I cannot charge you more than \$330 for a loan of \$2000 for 15 months. But I am entitled to require equal monthly payments of \$155.32, and, if you will be good enough not to pay the installments when due and give me instead a note for \$155.32 bearing interest at the maximum rate of one per cent per month for the remainder of the 15 months' period, I can charge you interest for 15 months on the first

note, interest for 14 on the second and so on for a total of 120 months or a total interest of 120 per cent making \$186.36 in addition to the original charge of \$330." This, indeed, is what plaintiff did.

Or suppose plaintiff had proposed to defendant as follows: "I cannot charge you but \$330 for a loan of \$2000 for 15 months. But I am entitled to require equal monthly installments of \$155.32 each and to declare the entire balance due if you fail to pay any installment. If you will be good enough not to pay the first installment when due, I shall declare the total sum of \$2330 due. In this way, I can charge you \$330 interest for the use of \$2000 for one month."

Both of the above hypothetical cases are regular on their face and pursuant to agreement of the parties. But in both cases, excessive interest is charged.

It is assumed *arguendo* that an initial note for \$2330 payable in 15 monthly installments of \$155.32 in consideration of a \$2000 advance is valid and enforceable. Each installment carries its 1/15 part of the \$330 interest or \$22 and its 1/15 part of the \$2000 principal or \$133.33, making the total of \$155.32. Now for the second note for \$2330, defendant gets \$1844.68 and a credit of \$155.32 to cover the first installment in this amount of the first note which included interest. His second note embraces \$330 in interest for both the cash and the credit of \$155.32, that is to say, \$25.63 of the interest of \$330 carried by the second note is interest for the credit of \$155.32 on the first installment of the first note which included \$22 of interest. \$3.63 of the interest of \$25.63 is interest on

the \$22 interest in the first installment of the first note. The first and each installment of the second note embraces its proportionate or $1/15$ part of this interest of \$25.63 or \$1.70, and its proportionate or $1/15$ part of the credit of \$155.32 or \$10.35, making a total of \$12.06, that is to say, each installment of the second note in the sum of \$155.32 embraces \$12.06 as accounted for.

The third note pays the second installment of the first note of \$155.32 which included \$22 of interest and paid also \$25.63 for the credit of \$155.32, the \$25.63 including \$3.63 interest on the \$22 interest. The third note also paid the first installment of the second note in the sum of \$155.32 which embraced \$1.70 interest and in addition, paid \$25.63 interest on the amount of \$155.32 paid on the second note. The third note thus paid \$310.64 which included interest on the first and second notes and \$51.26 interest thereon or \$361.90 and produced cash of \$1,689.36. Each installment of \$155.32 of the third note included its $1/15$ of the \$51.26 interest or \$3.41, the balance of \$151.91 covering $1/15$ of the cash advance of \$1,689.36 and interest thereon.

The fourth note paid the first installment of \$155.32 of the third note, including \$3.41 interest and the second installment the second note and the third installment of the first note paying three installments totalling \$465.96 and a total interest thereon of three times \$25.63 or \$82.89, each installment of the fourth note carrying $1/15$ of this interest or \$5.53.

For the purposes of illustrations, the twelfth note paid eleven installments on prior notes and eleven times interest of \$25.63 on each or \$281.93. Each installment of \$155.32 of the twelfth note carried $1/15$ of this interest or \$18.72. The thirteenth note paid, among other things, the first installment of the twelfth note and \$25.63 interest thereon, \$3.09 of the interest being interest on the \$18.72 interest in the installment of the twelfth note paid.

Enough has been said to show and illustrate the compounding of interest at 30-day intervals which continued over a four-year period. The total compound interest charged is reflected in the notes to which the proceeds of seven of the notes sued on were applied (R. 22-25-28-34-37-40-43). Compound interest is not recoverable under Revised Laws of Hawaii, 1945, Section 8737 in force throughout the period covered by the notes. There is therefore, either a total or partial failure of consideration for these notes. If partial, the notes are void to this extent, 10 C. J. S. Bills and Notes, Section 153. The burden in such a situation is on the plaintiff to show the consideration, 11 C. J. S. Bills and Notes, Section 155, page 80. Remand for reference to an auditor is strongly indicated.

Under the above cited statute prohibiting compound interest, the notes involved are *ipso facto* tainted with usury. 55 Am. Jur. (Usury) Section 54. The notes sued on given to pay former notes tainted with usury are themselves tainted with usury. 66 C.J. Usury, Section 203.

Calculation of compound interest on each of the almost 500 installments would be interminable. Defendant will, therefore, content himself with a calculation of compound interest on the notes as a whole without regard to the compound interest on the intersticed installments included in the notes. The Court will find it convenient to refer to Appendix I, Ap. Brief which may be verified as a composite (or compound denoting the interest charges) of R. 232 showing cash paid by plaintiff and R. 189-238 and R. 20-43 showing notes, application of proceeds thereof and payments thereon.

After the execution of the fifth note before the first note involved dated April 10, 1934, four installments of \$77.66 each of the first note were paid by credits from the fifth and the three preceding notes, leaving eleven installments thereof unpaid; three installments of the second note were likewise paid with 12 unpaid; two installments of the third note were likewise paid with thirteen unpaid, one of the fourth installment was likewise paid with fourteen unpaid, fifteen of the fifth installment were unpaid, i.e., \$776.60 was paid and \$5,047.90 was unpaid of the five notes before the first note involved herein of April 10, 1934.

The last mentioned note paid \$388.30 or five installments of \$77.66 each of the first five notes reducing the balance thereon of \$5,047.90 to \$4,659.60. (Compare Appendix I, Ap. Brief, with R. 191 for item of \$388.30. The latter has \$310.64 to Realty Investment Company and \$77.66 to plaintiff, a total of \$388.30.

The same difference appears in accounting for proceeds of next ten notes but is immaterial for present purposes). The following ten notes each paid \$388.30 on the first five notes and all together they paid 55 credits of \$155.32 each or \$8,542.60. First note paid one credit, second note two credits and so on (R. 194-207) on installments due on the first ten notes beginning with the April 10, 1934 note, leaving 95 installments totalling \$14,755 unpaid thereon, and the whole eleventh note for \$2330 due, totalling \$17,085 due on the eleven notes beginning with the first note involved dated April 10, 1934. \$3883.00 (ten payments of \$388.30 each) paid on the first five notes reduced the balance thereon from \$4,659.60 to \$776.60. Hence, \$17,861.60 was due on all notes after execution of the note of February 19, 1935, and before the cash payment of March 21, 1935.

For these eleven notes beginning with the April 10, 1934 note and totalling \$25,630 of which \$3630 was interest, defendant received \$4271.30 in credit on the five notes antedating the notes sued on, to which no exception will be taken in the present analysis. He received also \$9186 in cash to which no exception will be taken. In addition, he received credit of \$8,542.60 on notes of this series. Defendant paid \$3630 in interest for the total principal of \$22,000 (11 notes). For the credit of \$8,542.60 on notes of this series, i.e., eleven notes beginning with the April 10, 1934 note, he paid \$1,409.65 in interest incurring a note indebtedness of the total of \$9,952.25 for the credit of

\$8,542.60. This interest of \$1,409.65 is hereby designated as an unrecoverable portion of defendant's note indebtedness to which reference will be made in the recapitulation.

After February 19, 1935, and before the next note of June 12, 1935, defendant paid plaintiff \$5,824.80 in cash (R. 232) reducing the note indebtedness from \$17,861.60 to \$12,036.80, the balance due of \$776.30 on the oldest notes antedating the notes involved being wiped out. Hence, a note indebtedness of \$12,036.80 on notes beginning with the April 10, 1934 note was due when the note of June 12, 1935 was executed. The next six notes beginning with the June 12, 1935 note (for \$13,980) paid \$11,106.48 of this \$12,036.80 note indebtedness, leaving \$930.32 due. On these six notes, defendant received \$893.52 in cash. He paid \$1980 interest for both the cash and the credit or \$147.43 for the cash and \$1,832.57 for the credit. Of the \$13,980 total of these six notes, \$11,106.48 went to prior notes and \$1,832.57 to interest on this \$11,106.48, total \$12,939.05 to cover balance on eleven notes beginning with the April 10, 1934 note. This interest of \$1,832.57 will be referred to in the recapitulation as unrecoverable usury.

When defendant executed the note of January 28, 1936, he owed the above balance of \$930.32 on notes due when the June 12, 1935 note was executed, plus a note indebtedness of \$12,939.05 including \$1,832.57 interest to pay \$11,106.48 on notes before June 12, 1935, this indebtedness arising out of the six notes

beginning with June 12, 1935. On January 28, 1936, defendant thus owed a note indebtedness of \$930.32 representing balance due on notes when June 12, 1935 note was executed and \$11,106.48 applied to indebtedness on eleven notes beginning with the April 10, 1934 note, plus interest of \$1,832.57 on the latter sum—total \$13,869.37. He also owed a note indebtedness to cover the \$893.52 cash received by him on the six notes beginning with the June 12, 1935 note and interest thereon of \$147.43 or \$1,040.95, making a grand total of \$14,910.32.

Taking the next nine notes beginning with the January 28, 1936 note for convenience because they almost paid off the above grand total of \$14,910.32, these nine notes paid \$14,116.16 of the grand total, leaving a balance of \$794.26. On these nine notes, defendant received \$3,884.04 in cash. Defendant paid \$2970 interest for both the cash and credit or \$642.86 for the cash and \$2,329.17 for the credit. Of the total of \$20,970 of these nine notes, \$14,116.16 went to prior notes and \$2,329.17 to interest on this \$14,116.16, making a total indebtedness of \$16,445.33 arising out of these nine notes to pay the indebtedness of \$12,939.05, including interest of \$1,832.57 arising out of the preceding six notes which was incurred to pay \$11,106.48 of the indebtedness on notes beginning with the first note involved of April 10, 1934. (The above indebtedness of \$16,445.36 also went to pay a balance of \$936.02 antedating the June 12, 1935 note.) The

above interest of \$2,329.17 will be referred to in the recapitulation as unrecoverable usury.

After this series of nine notes, defendant owed a preexisting balance of \$794.26, which their proceeds, except cash, were insufficient to cover, and the total face of the nine notes, or \$20,970 made up as follows, cash received by defendant, \$3,884.04, interest thereon, \$642.86, credit on prior notes, \$14,116.16, including, among other things, credit of \$11,106.48 on still older notes and interest thereon of \$1,832.57, plus interest on the \$14,116.16 of \$2,329.17. Defendant owed \$21,764.26 after this series of nine notes and when he executed the note of September 29, 1936, less a cash payment of \$1,864.04 made December 31, 1935 (R. 232), or \$19,900.22.

The next twelve notes beginning with the September 29, 1936 note paid the preceding note indebtedness of \$19,900.22 with a balance in plaintiff's favor of \$99.78. On these twelve notes, defendant received \$2000 in cash for which he paid \$330 in interest. He paid \$3,283.54 interest for the credit of \$19,900.22. When defendant executed the first note sued on of August 31, 1937, he owed the preceding twelve notes amounting to \$25,630 less the above balance in plaintiff's favor of \$99.78 and less cash paid by him of \$3,999.54 during the period covered by these twelve notes (R. 232) or \$21,530.68. The interest of \$3,283.54 will be referred to below as unrecoverable usury.

It was demonstrated that defendant's indebtedness on a given group of notes in consideration of credit

on his indebtedness on a given group of prior notes, which included interest, was infected with usury to the extent that it exceeded the indebtedness to which the credit was applied. Accordingly, by way of recapitulation, the portions of defendant's note indebtedness designated above as usurious are not recoverable by plaintiff, these portions being as follows: \$1,409.65, supra, page 9; \$1,832.57, supra, page 10; \$2,329.17, supra, page 11; \$3,283.54, supra, page 11; total \$8,854.93.

This total deducted from defendant's note indebtedness when the August 31, 1937 note was executed, that is \$21,530.68, leaves a balance of \$12,675.75, on August 31, 1937, when defendant executed the first note sued on. Plaintiff applied to this balance on and after August 31, 1937, the total of \$15,183.18 (R. 232) paid by defendant in cash, over-paying his note indebtedness due on August 31, 1937 by \$2,507.43. Seven of the notes sued on are, therefore, without consideration since their proceeds were applied to this discharged indebtedness. The over-payment of \$2,507.43 offsets rebates paid by plaintiff to defendant in the sum of \$2,083.66 (R. 191-225), leaving a balance of \$423.77 applicable to the balance claimed of \$621.48 on the note, Exhibit D-1, R. 31, on which defendant received \$2000 in cash. Defendant owes plaintiff \$423.77.

The usury in the sum of \$8,854.93 embraced in defendant's note indebtedness of August 31, 1934, in the above sum of \$21,530.68 is interest on loans to pay

loans which included interest. The term covered by the interest on the loans thus paid was 15 months within which period 15 monthly installments of principal and interest (\$155.32 in case of \$2000 loan carrying \$330 interest) were payable. It is defendant's contention that plaintiff was not entitled to charge interest for the same term of these installments or on credits with which to pay the same as plaintiff in fact did. That is, when the first installment of \$155.32 including interest for 15 months fell due, plaintiff was not entitled to charge interest again on this sum for 15 months whether under the guise of forbearance or credit from a new note. It was the accumulation of such unauthorized charges of interest that made up the above usury of \$8,854.93.

It is to be noted in this connection that the first installment of a note was paid when due 30 days after date by the next note, the first installment of which was paid 30 days after date. If the latter installment is applied to the former installment, the former was paid in 30 days. It cannot be argued, therefore, that there was a 15 months' extension of time or forbearance on this installment for which interest was charged at the rate of one per cent per month on the amount of the installment or the credit with which to pay it, and that the 15-month period overlaps the period for which interest was included in the former note. Even if it can be said that defendant borrowed \$155.32 for 15 months to pay an installment due at the time, paying interest at one per cent per month

for the period, the fact is he paid an equivalent sum in 30 days. Interest covering the remaining 14 months was not earned, and the first month was one of the fifteen months for which interest on the same amount had been charged in the former note.

CONCLUSION.

The foregoing argument acquiesced in the Supreme Court's approval of the interest charges made by plaintiff. It points out the continuity of the transaction between the parties and the compounding of interests at monthly intervals which was latent in the transaction. If it had been hinted to the Supreme Court that when defendant gave a new note to cover an interest bearing installment of a prior note plus interest thereon, interest was thus compounded and that interest continued to be thus compounded monthly in geometric progression, the Court would have given defendant credit for the compound interest on his notes covering the same, or would have remanded the case to the trial Court for a restatement of the account between the parties as was done in the similar case of *Nawahi v. Trust Company*, 30 Haw. 359. If it had been hinted to the Supreme Court that when defendant gave a new note to cover an interest bearing installment of a prior note, and to cover also interest for the same period for which the interest in the installment was charged, the Court would not have countenanced the twofold interest

charge but would have given defendant credit for the second charge on his note indebtedness.

It is submitted that in view of the complicated accounts involved, the case should be remanded to the trial Court for a statement of account between the parties.

Dated, Honolulu, T. H.,
August 12, 1948.

Respectfully submitted,
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